

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN-DIVISION

RICHARD LEE TABLER,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 6:10-CV-034-RP
)	
LORIE DAVIS, DIRECTOR)	
CRIMINAL INSTITUTIONS DIVISION,)	
TEXAS DEPARTMENT OF CRIMINAL)	
JUSTICE,)	
)	
Defendants.)	
_____)	

TRANSCRIPT OF EVIDENTIARY HEARING PROCEEDINGS
BEFORE THE HONORABLE ROBERT PITMAN
MONDAY, JULY 09, 2018, 10:16 AM

FOR THE PLAINTIFF: PETER J. WALKER, ESQ.
SHAWN NOLAN, ESQ.
MARCIA A. WIDDER, ESQ.

RICHARD L. TABLER, PRO SE

FOR THE DEFENDANT: RACHEL L. PATTON, ESQ.
JAY D. CLENDENIN, ESQ.

Proceedings recorded by mechanical stenography, transcript
produced using computer aided transcription.

Pamela J. Andasola, CSR/RMR/FCRR
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I N D E X P A G E

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For the Petitioner:

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MORNING SESSION, JULY 09, 2018

(The following proceedings were had in
open court with all parties present at
the hour of 10:16 a.m.)

THE CLERK: Court calls W:10-CV-34, Richard Lee
Tabler versus Lorie Davis.

THE COURT: If we can have announcements for the
record, please.

MR. NOLAN: Good morning, Your Honor. Shawn Nolan
from the Federal Defender Office in Philadelphia on behalf
of Mr. Tabler.

THE COURT: Good morning, Mr. Nolan.

Would you like to introduce anybody else?

MR. WALKER: Peter Walker from the Federal
Defender Office on behalf of the petitioner, Your Honor.

THE COURT: Mr. Walker.

MS. WIDDER: And Marcy Widder on behalf of
Mr. Tabler.

THE COURT: Good morning, Ms. Widder.

And from the State?

MS. PATTON: Rachel Patton, Texas Attorney
General's Office on behalf of the Director.

MR. CLENDENIN: Jay Clendenin from the Attorney

1 General's Office on behalf of the Director.

2 THE COURT: Very good. Thank you all very much.

3 So first let me address the petitioner's motion to
4 extend the hearing. I understand the request -- and let me
5 just give you sort of the reasoning behind, and an
6 assurance, that I'll give you what you need.

7 I'm not convinced that we're not going to make it
8 through what we need to today. In the event that we did
9 finish and we still had to all come back for another witness
10 that -- it's such an ordeal, frankly, for the petitioner to
11 come here and the logistics of it and such, that I thought
12 that the relative burdens were such that we'll give it our
13 best shot to finish today.

14 And if we don't, I assure you I'll give you the
15 full opportunity, we'll come back and reconvene in another
16 day to make sure that you have the opportunity to get
17 everything on the record that you need to.

18 MR. NOLAN: Thank you, Your Honor.

19 THE COURT: Thank you. All right.

20 MR. NOLAN: Your Honor, first, Mr. Tabler has just
21 handed me a letter for the Court and he had asked me to hand
22 that up to you.

23 THE COURT: Very good. Thank you.

24 Have you seen a copy of it?

25 MS. PATTON: We have not, Your Honor.

1 MR. NOLAN: He just handed it to me, so if I can
2 show it to them?

3 THE COURT: Yeah, if you could let -- thank you.
4 Thank you.

5 All right, does anyone have an objection to having
6 this admitted as Petitioner's Exhibit Number 1 just for the
7 record for the purposes of this hearing?

8 MR. NOLAN: That's fine, Your Honor.

9 MS. PATTON: No objection, Your Honor.

10 MR. NOLAN: The only problem is in terms of
11 numbering, I don't want to be off on numbers. We have a lot
12 of premarked exhibits.

13 THE COURT: If you will give me the next number in
14 the line.

15 MR. NOLAN: So that could be marked 76.

16 (Whereupon, Petitioner's Exhibit No. 76
17 was offered.)

18 THE COURT: Okay. Exhibit 76? Okay. Without
19 objection so admitted.

20 (Whereupon, Petitioner's Exhibit No. 76
21 was received in evidence.)

22 THE COURT: Mr. Tabler, I'll give this careful
23 consideration. Thank you.

24 All right, as you are all aware, we are here
25 because Mr. Tabler, having filed petitions for review --

1 habeas review -- of his convictions, has indicated
2 repeatedly in writing and during a telephone conference his
3 desire to waive the remainder of his -- the relief that's
4 pending to have his lawyers cease work on his behalf. And
5 because he's chosen to do so, federal law requires that I
6 have a hearing to make sure that Mr. Tabler is aware of the
7 consequences of this decision and to ensure that he's making
8 an informed, rational and voluntary choice.

9 So, Mr. Tabler -- and I'm pronouncing that
10 correctly, is it Tabler?

11 MR. TABLER: Yes, sir.

12 THE COURT: I'm going to be saying that a lot
13 today I want to make sure I'm saying it correctly.

14 Before we begin, Mr. Tabler, can I get you to
15 please stand and raise your right hand to be sworn.

16 RICHARD LEE TABLER,
17 was called as a witness and, having been first duly sworn,
18 testified as follows:

19 MR. TABLER: Yes, I do.

20 THE COURT: Thank you. Please be seated.

21 =====
22 EXAMINATION
=====

23 BY THE COURT:

24 Q. Now, before we go any further, Mr. Tabler, let me
25 give you the opportunity now to let me know whether it's

1 still your desire to go forward with this hearing and to
2 express your desire to forego your post-conviction remedies,
3 waive your right to future representation and appeals in
4 this case.

5 Is it still your desire to do so?

6 A. Yes, sir, it is.

7 THE COURT: Okay. Very good. The issues before
8 the Court today then are, number one, whether Mr. Tabler
9 fully understands the choices or options available to him at
10 this point in his legal proceedings. Two, whether his
11 decision to seek -- excuse me -- to cease this process is
12 one that he's making voluntarily and not the result of any
13 duress or outside pressure. And then, three, whether
14 Mr. Tabler is free from any mental disease, disorder or
15 defect which might interfere with his ability to make a
16 knowing choice in this matter.

17 To that end the Court has appointed in this case a
18 neutral mental health expert, Dr. Michael Arambula and
19 ordered Mr. Tabler to meet with Dr. Arambula, and to
20 cooperate with his examination. This meeting was held, it
21 occurred this past May. Dr. Arambula then produced a report
22 that has been presented to the Court and is a part of the
23 record already in this case.

24 we will be hearing from the Court's expert at some
25 point in this hearing, after which we will give the

1 petitioner the opportunity to present any evidence that he
2 would like to present.

3 But before so, Mr. Tabler, if you will allow, I
4 need to go through a rather lengthy inquiry with you, ask
5 you a number of questions. And if at any point you don't
6 understand me or if at any point you need me to explain
7 something further, will you please -- it's very important
8 that you let me know that because probably more than any
9 other hearing that either of us have ever had the stakes
10 here are very important, very high, and I want to make sure
11 that I'm satisfied that you understand everything that's
12 going on and that you feel like that you have the
13 opportunity at any time to tell me that you don't understand
14 or you need me to repeat or explain.

15 will you do that?

16 MR. TABLER: Yes, sir.

17 Q. (By The Court) Okay. Now let me ask too -- it
18 occurred to me as I was coming in. I knew that sometimes
19 the trip here itself is difficult and so, could you tell me,
20 just so that I'll have an idea of your current, sort of
21 whether you're exhausted or what your current state of mind
22 is.

23 Can you tell me how early you had to get up and
24 what you've gone through already today.

25 A. I've been up since three o'clock this morning. I

1 got up at three o'clock, woke up, made sure I was up and
2 ready for when they came and got me. They came and got me a
3 little after 4 a.m., took me down to the holding booth. I
4 was there. Transportation came from Huntsville to pick me
5 up a little after 5:30.

6 Q. Okay.

7 A. So I've been up since three o'clock this morning,
8 so I'm good to go to the end of the day.

9 Q. Okay. And you may feel that now, but if at any
10 point you become tired or -- because, you know, I don't
11 think any of us have been up since three o'clock -- well,
12 actually, I have.

13 But, if at any point you feel like, you know,
14 you've reached the limit and you're kind of tired, please
15 assure me that you will let me know that.

16 And there's no pressure on you at all today. We
17 can do this another day. We can do it in chunks. The
18 important thing is that I'm assured that at every point in
19 this proceeding you're -- you know, you're rested, you're
20 understanding things and you're not exhausted and that's not
21 affecting your ability to hear me and understand me.

22 will you do that?

23 A. Yeah, I understand that. And it's like that
24 letter motion you just read, right? I'd rather just get it
25 all done today if we can because there's certain

1 circumstances and people here that are not going to be able
2 to come back so if we can get it over with today I would
3 like to end it today.

4 Q. I understand that, and I'm with you on that, but
5 again the most important thing is that at any point that you
6 are operating at the level where I have confidence that you
7 are understanding what's going on and you're not sort of
8 trying to get it over with.

9 A. Yeah.

10 Q. And I can -- I'll have to rely on you, because
11 honestly it's very important that if you start to get
12 fatigued -- I know it's not ideal, but we'll just have to do
13 it another day.

14 But you understand me, right?

15 A. Yes, I'm good.

16 Q. Okay, great. Thanks.

17 So as you know, the purpose of the dialogue that
18 we're going to engage in for the next few minutes is to
19 satisfy me that you are making a knowing and voluntary
20 decision to waive further rights that you have in this case
21 to pursue the petition that's in this court presently.

22 Now, assuming that you are rational and that you
23 understand the consequences of your actions, the law is
24 clear that you do have the right to waive further process
25 and that your counsel be directed to stop working on your

1 behalf.

2 But before we go there, I want to talk a little
3 bit about the background information that I've gone through
4 in your case and talk about you and the history of your
5 case.

6 First of all, how old are you, sir?

7 A. I'm thirty-nine.

8 Q. And how much education have you had?

9 A. Completed the 11th grade.

10 Q. Okay. Now, the records before the Court show that
11 you were convicted of capital murder in Bell County in 2007;
12 is that correct, sir?

13 A. Yes, sir.

14 Q. And do you remember who represented you at that
15 trial?

16 A. Yes, sir.

17 Q. And who was that?

18 A. David Schulman, John Jasuta, and Buckie Harris,
19 Robert Harris.

20 Q. What I'm talking about now though is the original
21 trial in Bell County.

22 A. That was Robert Harris, Jack Holmes, and -- those
23 were the main two.

24 Q. Okay. Now, the records show that following your
25 conviction that your sentence was affirmed on direct appeal

1 with the Texas Court of Criminal Appeals and cert was denied
2 by the United States Supreme Court in October of 2010. Does
3 that sound right to you?

4 A. Yes, sir.

5 Q. All right. Now, while your direct appeals were
6 pending you were appointed counsel to represent you in
7 filing a state habeas action application. Do you remember
8 at that time who your attorneys were?

9 A. Yes.

10 Q. And who were those?

11 A. David Schulman, John Jasuta.

12 Q. Okay. Thank you.

13 At the end of the day no petition was filed by
14 those lawyers because you requested, as you are now, to
15 waive the right to any state habeas proceedings and
16 volunteer for execution; is that correct?

17 A. Yes, sir.

18 Q. Okay. Now, do you recall whether a hearing was
19 held concerning your competence to waive your rights at that
20 time?

21 A. Yes, sir, September 30th, 2008, 264th District
22 Court, Martha~Trudo, Bell County.

23 Q. Do you recall the results of that hearing?

24 A. Yes.

25 Q. And what were those?

1 A. Found competent and my waiver was granted.

2 Q. Now after that, the record indicates that you
3 changed your mind about waiving your rights, and do you
4 recall that?

5 A. Technically I didn't change my mind. My attorneys
6 filed something against my behalf and that was where Walter
7 Smith came in, previous judge in this courtroom, and I was
8 given a stay.

9 Q. Okay. Can you tell me a little bit more about
10 that, about the relationship between you and your attorneys
11 and what your desires were at that time?

12 A. At that time it was pretty much to get it over
13 with. I'm guilty of my crime so why waste this time sitting
14 in a cage waiting for an execution date to come or an appeal
15 process to go through?

16 My attorneys were just going to stand by and let
17 it happen but they were getting outside pressure from other
18 lawyers, from TDS, Texas Defender Services, and thus they
19 felt the pressure and they had to file something and they
20 filed something.

21 And the previous judge in this courtroom or Waco
22 Division was Walter Smith, Jr., and he found that it was
23 involuntary, it wasn't voluntary that I wanted to waive
24 because I simply refused to answer one of his questions.

25 Q. Now what I want to clear up though is that you had

1 a hearing in state court though and that's the one that I
2 want to be talking about where you were found competent and
3 then you changed your mind, and that was still in the state
4 system. Do you recall that?

5 A. Yes. And, again, I still didn't change my mind.
6 That was David Schulman and John Jasuta were saying that I
7 changed my mind. They asked me certain things and they were
8 basically trying to make empty promises to get me to do what
9 they wanted me to do.

10 Q. Can you tell me a little bit more about that?

11 A. It's basically -- you know how lawyers can be,
12 Judge, really.

13 Sorry.

14 But, it's just you're ready to go and lawyers try
15 to find a way and say, Hey, why don't you ride a little
16 longer, give us an opportunity. And they try to make empty
17 promises like, well, TDC is not all that bad, prison is not
18 all that bad, you've got skills, you've got things you can
19 do to make your time go by easier and better.

20 All right, that may be true in some cases but my
21 mind stayed just like my mind stayed now, it's like, I'm not
22 trying to spend the rest of my life in a box, period. You
23 see what I'm saying? I'm not -- I don't like being told
24 what to do, you know. I don't like eating this crappy food
25 that has no flavor. All right?

1 I'm literally going crazy in that cage and I
2 know -- I know myself. Everybody has a line. Everybody has
3 a limit. I've reached my limit.

4 And basically, I fear for those around me, if you
5 put me in GP, plain and simple.

6 Q. All right, Mr. Tabler. So going back to that time
7 in state court when you say that you hadn't changed your
8 mind but your lawyers were pursuing the relief against your
9 wishes, did you communicate them -- excuse me -- did you
10 communicate that to them at the time?

11 A. Yes, sir, I did.

12 Q. And what you're telling me now is that over your
13 objection they continued to try to withdraw the waiver that
14 you had filed?

15 A. Yes. There was times -- don't get me wrong, Your
16 Honor. There was times when they said something and I
17 agreed on it and I wrote something, let it go a little
18 farther, let me see what they're doing, give them an
19 opportunity. But you can only take so much for so long.

20 Q. As a result of that, do you recall that the Court
21 of Criminal Appeals in the state system denied your request
22 to reinstate your habeas proceedings?

23 A. Yes, sir.

24 Q. So you understand well that that's what can happen
25 if you decide to waive and then even if it's just by your

1 lawyers, if a request is made to withdraw that waiver, that
2 you understand that sometimes that's what happens, in fact,
3 that's likely what happens, is that you are not able to
4 withdraw that waiver. Do you understand that?

5 A. Yes, sir.

6 Q. All right.

7 Now your case then proceeded to federal court
8 where you filed a number of letters asking that your
9 attorneys be fired and requesting an execution date. Do you
10 recall that?

11 A. Yes, sir, since September last year.

12 Q. Okay. Now -- but I'm talking about even before
13 that, before your first federal hearing. Do you recall
14 that?

15 A. Yes, sir.

16 Q. Now, your attorneys Mr. Schulman and Mr. Jasuta
17 then requested a hearing into your competency to waive your
18 appeal and then we get to what you've been talking about and
19 that is the hearing that Judge Smith held in Waco, do you
20 recall?

21 A. Yes.

22 Q. Do you recall when that was?

23 A. I want to say 2010.

24 Q. Okay, 2011, does that sound --

25 A. Somewhere around there, yeah.

1 Q. Okay. Now, your case then was heard by Judge
2 Smith, but before that you were given a mental-health
3 evaluation prior to that hearing. Do you recall that?

4 A. Yes, sir.

5 Q. And what do you remember about that evaluation?

6 A. Again I was found competent.

7 Q. But about the evaluation itself.

8 A. Um, really don't remember. There's been so much
9 going on and so many different psychologists and
10 psychiatrists coming and doctors and everybody's talking to
11 me. It's -- you know, it's kind of like in one ear and out
12 the other, out of sight out of mind. It's been so long.
13 It's 2018. That was 2011.

14 Q. No, I understand.

15 So let me refresh your recollection a little bit,
16 is that you were evaluated by Dr. Richard Saunders, does
17 that name ring a bell?

18 A. Yes, sir.

19 Q. And that Dr. Saunders produced a report for Judge
20 Smith just like Dr. Arambula did in this case. And then
21 there was a hearing held, do you recall that?

22 A. Yes, sir.

23 Q. Now, I have reviewed the transcript of that
24 hearing that you had with Judge Smith back in 2011 and do
25 you remember the hearing itself?

1 A. Pretty much.

2 Q. Can you tell me what you recollect about what
3 happened at that hearing?

4 A. Actually it was kind of like this. He asked me
5 some questions. He asked me if I understood everything that
6 I was doing. I told him yeah. He asked me if I wanted to
7 continue waiving my appeals. I said yes. He asked me some
8 other questions, say, roughly, was I being coerced or
9 anything like that, was it voluntary. And I answered
10 truthfully on all of them.

11 He asked me something and I told him -- I told him
12 I plead the 5th. I refuse to answer you. And when I
13 refused to answer him that question, my counsel said
14 something to him on the side, either side chambers or
15 whatever, but not in my sight. They came back and he ruled
16 that it was involuntary.

17 Q. I think your memory of that is correct, as I have
18 reviewed the transcript. And just like today, there were
19 two issues there, one was whether or not you knew what you
20 were doing --

21 A. Exactly.

22 Q. -- and the second was whether you were doing it
23 voluntarily. And it was that second part that Judge Smith
24 followed up on, is that your memory?

25 A. Yes.

1 Q. Okay.

2 A. Can I point something out real quick?

3 Q. Please.

4 A. On all these, with Judge Smith and hearing now,
5 just so we've got the record straight right here in front of
6 everybody. Everybody is going to try to say -- even back
7 then with Judge Smith -- that situation with the death-row
8 inmate with the cell phone that called State Senator John
9 Whitmire, right. I dropped my appeal in September,
10 September 30, 2008. This cell phone incident happened in
11 October of 2008.

12 I already tried to drop my appeal before the
13 cell-phone situation so I really don't want to hear anybody
14 trying to say, well, the cell-phone situation is why he's
15 dropping his appeal. Hold up, I was dropping my appeals
16 before the situation.

17 Q. I understand that, but my review of -- and I've
18 tried to get as much information about everything that's
19 happened in this case and so I am familiar with what you are
20 talking about there. And I don't think that my concern is
21 necessarily the timing of when you were asked, but one of
22 the things that I think -- and you can correct me if I'm
23 wrong -- one of the things that changed after the -- we'll
24 call it the cell-phone incident was the circumstances of
25 your confinement, right, and what you -- some of the things

1 you were complaining of. So it wasn't necessarily at that
2 moment what happened with the cell phone but what happened,
3 according to you, as a result of that. So that kind of
4 lasted for some period of time.

5 A. It's still lasting.

6 Q. Okay. And that's really what I want to get to.

7 Can you describe for me -- because you did talk to Judge
8 Smith a little bit about some of the things that you were
9 going through then that were factoring into your making this
10 decision. Can you tell me what you recall telling Judge
11 Smith?

12 A. Ask your question again, Judge.

13 Q. Sure. No, that's fine.

14 Do you remember at the time one of the things you
15 were talking about is the circumstances there in prison. Do
16 you remember what you were telling Judge Smith at the time
17 that was difficult for you?

18 A. At the time, right, over on death row Polunsky
19 Unit, death row is housed on 12 Building. 12 Building has
20 six pods, A through F. Each pod has eight door cells,
21 single-man cells, right, with six day rooms and four outside
22 recs. There's no TV. There's no phones.

23 On each section, it's a 14-man section. You've
24 got A through F, fourteen here, fourteen here, fourteen
25 there.

1 Each section, fourteen cells, has one shower on
2 one row, one shower on two row.

3 I was confined on a fourteen-man section by myself
4 for two and a half years. I had a camera in my cell and I
5 had an officer in front of my cell for two and a half years
6 monitoring me.

7 For six and a half months I was butt-ass naked
8 without a mattress or anything. I was treated worse than an
9 animal, a dog in a cage.

10 So, yeah, it got to me at times; but, you know
11 what, in the end I brought it on myself. This is how they
12 decided to secure me and treat me, all right, I understand.
13 Maybe a little bit of retaliation for them getting chewed
14 out, me getting busted with a cell phone and the Governor
15 chewing them out. I can understand. I can accept it.

16 But when it continued to go on and go on and go
17 on -- everybody's got their breaking point and I'm not --
18 besides the situation why I'm here, why on death row,
19 overall I'm not a violent person but I feel the violence
20 within me from my treatment and just all this confinement.

21 I've had enough.

22 Q. Well let me follow up on that. What comes to mind
23 is one of the things that you said to Judge Smith. I don't
24 know if you remember this or not, but one of the things you
25 said to Judge Smith was you thought at the time that it felt

1 like he was trying to talk you out of your decision to waive
2 your rights, do you remember that?

3 A. Yes, I do.

4 Q. And because what I'm about to ask you, I want you
5 to be assured that that's not my purpose here. I am not
6 trying to talk you in or out of anything, into or out of any
7 decision. My only interest here is making sure it's really
8 your decision, that you can make it, that you have the
9 capacity to make it and that you're not being affected by
10 outside things in making that decision.

11 A. Your Honor, I understand your situation. I
12 understand that. I've got lawyers trying to talk me out of
13 it.

14 Q. Exactly. And I'm not trying to do that because at
15 the end of the day, this decision is yours, sir, as long as
16 I'm satisfied that the legal requirements are met about your
17 competence and that it's voluntary.

18 I say that only to say this -- and, again, I'm not
19 trying to talk you in or out of anything but you are
20 saying -- what I'm hearing you say is that the circumstances
21 that you find yourself in are so miserable and so difficult
22 that that is playing a part in you wanting to waive the
23 rights that you have to proceed.

24 Now, you know, this is a very --

25 A. Can I stop you for a second?

1 Q. Please. Sure, sure, sure.

2 A. In part, a little tiny bit, that's my situation;
3 but, overall, we're not here about me. What about my
4 victims? That's my main reason why I'm ending my appeals.
5 It wasn't -- what I did was wrong. I have regrets. You
6 know, I have regrets and I have guilt and my guilt is eating
7 at me.

8 This -- this is no way to live. I was sentenced
9 by a judge and a jury. That's my punishment. Witnesses
10 took the stand. That's my punishment. Deal my punishment
11 but don't drag it out.

12 Q. I hear you. And what I hear you saying and I
13 believe you to say is that there may be a lot of reasons
14 that you're wanting to do this, but it's my job to focus on
15 just one or two of them today.

16 A. Right. I understand.

17 Q. And I won't forget the other ones you've mentioned
18 but I have to kind of drill down a little bit on one of the
19 things that you've said, and that is, again, some of the
20 things that are motivating this decision are the conditions
21 that you are in.

22 You know, I have to observe that there are things
23 both within the system, administratively, that you can do to
24 complain about those circumstances and there are things --
25 and I know this is cold comfort to you because I preside

1 over a lot of these cases and I know the realities of it,
2 sir.

3 But I have to remind you that there are things,
4 administratively, that you can complain of and at the end of
5 the day the courts can become involved in determining
6 whether or not the conditions of your confinement violate
7 your constitutional rights.

8 And sometimes courts can do things about some of
9 the things that you complain about, sometimes they can't,
10 and you know that better than I do.

11 And I'm not in a position and I don't want to
12 patronize you and tell you that I can make a difference in
13 those things, honestly, but I also want to remind you there
14 are things in the system that are designed to address some
15 of the things that you're complaining about.

16 Do you understand that?

17 A. Yes, I do. I also understand that this is the
18 State of Texas and I reside in TDCJ, so basically,
19 everything we're talking about, everything you're saying is
20 falling on deaf ears with TDCJ in Texas, right?

21 Q. I understand that. But I just want to remind you
22 that there are things that you can do and that lawyers can
23 do on your behalf potentially to address some of the things
24 that you are complaining about.

25 And, again, there are no guarantees that that

1 would get better but I just want to remind you that there
2 are processes that you can go through that have -- that may
3 have some potential to improve some of the things that you
4 are complaining about.

5 Do you understand that?

6 A. Yes. I've tried to go through the process for the
7 last ten years and it's no good. It's pointless.

8 Q. Okay.

9 So, let's get back to sort of the procedural
10 history in this case and that is that, as you suggest, Judge
11 Smith did find that you were competent but found that the
12 decision that you were making was not voluntary. Now, the
13 best I can tell from reading the record of that -- and again
14 that was several years ago -- but the best I can tell is it
15 involved certain -- a claim that you made that there were
16 threats against your family, that if you didn't withdraw
17 your waiver that there were threats against your family. Do
18 you remember that?

19 A. Yes, sir, I do.

20 Q. Is that something you're willing to talk about
21 today?

22 A. Yeah. I mean, everybody receives threats here and
23 there, you know. I messed up a good thing for a lot of the
24 inmates and a lot of people, but the individuals that were
25 putting pressure on me, they're dead now so I'm not worried

1 about it so I'm not worried about their impact or anything
2 that they could possibly do to me or my family at any time.
3 They've been dead for numerous years now.

4 At that time, yeah, I was receiving threats.
5 People were threatening my family through me.

6 It's not happening anymore and I'm not really
7 worried about my family. The one person who means the world
8 to me is in this courtroom right now and she's got -- she's
9 got protection. I'm not worried about my mom or anybody
10 right now.

11 Q. So you're ahead of me and that was where I was
12 going with this, and that is I want to make sure that
13 whatever you were concerned about at the time that you
14 expressed to Judge Smith, I wanted to ask what's different
15 now and you've told me that you believe that whatever
16 threats you believe existed at the time no longer exist?

17 A. Yes. There's no problems and nothing from my past
18 has anything to do with why we're here today. I guarantee
19 you that.

20 Q. Okay. All right.

21 Now, I want to change gears here, Mr. Tabler, and
22 talk to you and make sure you understand what the
23 consequences would be if -- and I think you do but for the
24 record I need to make sure that you do understand these
25 things and if you have any questions let me know.

1 But I know you're aware that the decision to give
2 up the process that now you have initiated in federal court
3 is a very serious one, obviously, with very serious
4 consequences but as I've said a couple of times already, it
5 is one that you have the right to make.

6 But I want to talk to you now and make sure you
7 understand that the consequences of your decision would be
8 that -- well, let me first say that both the Supreme Court
9 and the 5th Circuit Court of Appeals have made it clear that
10 someone in your situation, the best course is to have you
11 evaluated by a mental-health professional, which has been
12 done in this case, and we have a report from Dr. Arambula
13 and we'll have the opportunity in a minute to hear from him
14 directly.

15 But the purpose of that is to make sure that
16 you're free from any mental disease, disorder or defect that
17 might interfere with your ability to make a choice. And so,
18 again, that's what we'll get into with Dr. Arambula.

19 But it's also recommended that I have a
20 face-to-face conversation with you about those things as we
21 have been doing. And, again, it's not to question the
22 wisdom of this decision, it's your decision to make.

23 But -- and, again, I don't want you to
24 misinterpret anything I'm saying as being, you know, trying
25 to talk you out of anything or into anything.

1 But we're here because of the long-settled
2 principle in federal court that these waivers must be
3 knowing, intelligent and voluntary. So in practical terms
4 this must mean that this choice is yours, yours alone; that
5 you know what you're doing; that you're not motivated by
6 anything that is affecting your ability to make a free
7 choice; that you understand the full consequences of what
8 will happen if I allow you to waive these rights.

9 And so, first of all, do you understand that you
10 have the right to continue attacking your conviction and
11 your sentence through the federal habeas process that you've
12 initiated in this court and that if relief is denied, you
13 could still proceed and appeal whatever decision I made to
14 the 5th Circuit and ultimately to the United States Supreme
15 Court. Do you understand that?

16 A. Yes, sir.

17 Q. And do you understand that if you permit your
18 lawyers to continue litigating on your behalf, either in
19 this court or before the 5th Circuit or even the Supreme
20 Court, there's a possibility always that you could be
21 granted habeas relief from your conviction or sentence and
22 the relief could be in the form of either a life sentence or
23 a new trial. Do you understand that?

24 A. Yes, sir.

25 Q. Now, let's discuss the consequences of giving up

1 those rights. Again, I just want to make sure you're
2 aware -- and I know you are -- but if you decide to waive
3 and you are found competent to do so and this has been
4 voluntary, that all of the processes that have been
5 initiated in federal court, that is your federal habeas
6 petition, everything that's been initiated on your behalf in
7 this court will end immediately, and federal law makes it
8 difficult, extremely difficult, to reinitiate this process
9 once they have been terminated. That is, if you decide that
10 this is what you want to do, I will terminate all of the
11 petition, all of the action, all of however you want to call
12 it, the appeal that's pending in this court. There will be
13 nothing left in this court for you to seek relief through.

14 And that if I let you do that, the law makes it
15 very, very difficult for you to reinitiate that; that is,
16 you can't change your mind. Do you understand that?

17 A. Yes, sir.

18 Q. If you did try to change your mind after I let you
19 waive this petition, then you would have to get permission
20 from the 5th Circuit in New Orleans. And Congress has
21 seriously limited the circumstances in which such permission
22 could be granted, only in truly extraordinary circumstances
23 could you be given permission to restart these proceedings.
24 Do you understand that?

25 A. Yes, sir.

1 Q. So, let me ask again, do you understand that if
2 you end these proceedings now you will have to get
3 permission from the 5th Circuit before you can challenge
4 your conviction in federal court? Do you understand that?

5 A. Yes, sir, I do.

6 Q. Do you understand it's extremely unlikely the
7 5th Circuit would be able to grant you that permission?

8 A. Yes, sir.

9 Q. In general, Mr. Tabler, do you understand that if
10 you chose not to proceed further with your federal habeas
11 corpus case there's virtually no possibility that any
12 federal court, either the Supreme Court or the 5th Circuit
13 or me, will be able to grant you any relief from your
14 conviction or sentence. Do you understand that?

15 A. Yes, I do.

16 Q. Mr. Tabler, do you understand that it's possible,
17 even likely, that the State would seek to set an execution
18 date in the near future if you decide to proceed?

19 A. Yes, I do.

20 Q. And knowing all that I've talked to you about
21 today, is it still your desire to waive your right to
22 representation and forego any post-conviction appeals on
23 your behalf?

24 A. Yes.

25 Q. All right.

1 Let me ask, now that we've talked for a few
2 minutes, have you had any trouble at all following anything
3 that we've been talking about, any of my questions?

4 A. Sure does sound like you're trying to talk me out
5 of it.

6 Q. Okay. That's fair. That's fair.

7 I hope you can understand someone in my position
8 though, and it's not unlike what your lawyers are trying to
9 do, it's our job to make sure you understand what you're
10 doing and it's ultimately my responsibility.

11 But have you had any trouble following me?

12 A. No, sir.

13 Q. Do you believe you've understood everything that
14 we've talked about today?

15 A. Clearly.

16 Q. Do you have any questions about anything that's
17 come up? As we've talked about things, has anything popped
18 into your mind that you have any question about?

19 A. Not concerning what we've spoken about, but do I
20 have one question.

21 Q. Please.

22 A. At the end of this, will you make your ruling
23 today or will you do it by mail?

24 Q. I will not make my ruling today because I want
25 to -- we're going to have a lot of evidence this afternoon

1 and the reason I won't do that is because that will be the
2 first time that I hear some of the things that are being
3 said. And I'll have the opportunity to question, as will
4 both sides here, the witnesses, and sometimes, frankly, I
5 need time to process what I've heard for the first time.

6 These decisions are too important to make on the
7 spur of the moment and so out of fairness to you and out of
8 respect for the importance of the decision I'm going to
9 make, I will not make it from the bench but I will take time
10 to reflect on the things that I've heard today.

11 I understand -- I think I understand why you're
12 asking me that. I will give you every assurance that this
13 is the most important thing that I'm doing right now. This
14 has my full attention. And I will -- even though I won't
15 make the decision today, I will make it just as soon as I
16 believe that I've had an adequate opportunity to carefully
17 consider everything I've heard here today.

18 A. Are we talking like months, Judge?

19 Q. No, I don't -- it won't be months. No, sir. I
20 can't tell you -- I mean, I'm not going to give you a date
21 but it will not be -- and I understand why you're asking but
22 it will not be that.

23 Absent any -- something would come up where if
24 somebody -- if I give someone an additional opportunity to
25 put something in the record that requires that, that may be

1 necessary, but I don't foresee that and I understand the
2 reason that you're asking me that.

3 A. All right.

4 Q. Do you have any other questions?

5 A. Not at this time.

6 Q. All right.

7 I think you've done this in response to many of my
8 questions but I want to give you the full opportunity so you
9 can either repeat things you've already said or you can add
10 to it and that is, could you put in your own words why
11 you're deciding at this point not to go further with this
12 proceeding? Is there anything to add to what you've already
13 said? I know you've said quite a bit.

14 A. There's -- you want honesty?

15 Q. Please.

16 A. There's an inmate recently on death row, his name
17 is Bill Tracy. He killed a TDC guard at another unit. They
18 sentenced him to death, right? I can understand where he
19 did something out in GP.

20 My situation is a little different and I feel -- I
21 feel the rage beneath my skin building from a lot of stuff.
22 And I don't want to take my anger out on these guys or those
23 that house me on death row. So besides what you already
24 know, that's another reason. Let's go ahead and get this
25 over with before it's too late and something happens.

1 Q. Is there anything else that you would like to say?

2 A. Not at this time.

3 Q. Okay. If at any point during this process I'll
4 give you -- after everyone's talked I'll give you another
5 chance to say anything because you may hear something as we
6 go along that reminds you of something or maybe even a new
7 thought you have about something. So don't worry that
8 that's your last word, I'll give you the opportunity to say
9 anything you want later.

10 A. No, Judge. I appreciate and I understand that and
11 I can straight up tell you there's only one person in this
12 courtroom, besides myself, that could stop me from doing
13 this, and unless she stood up and told me that she's
14 standing against me, we're going to ride this to the end
15 until you grant me my waiver.

16 Q. Okay. Thank you, sir.

17 A. Only person. That's my mother. She brought me
18 into this world and she can take me out, like she's always
19 told me. I brought you in here, I can take you out.

20 So if she stands up and tells me that she wants to
21 see me, knowing that she knows I'm guilty, continuously go
22 through here and go through this -- pardon my French -- this
23 bullshit in this system, then I ride with my attorneys. But
24 until that time comes, I respectfully ask you to let me
25 waive my rights.

1 Q. Mr. Tabler, I understand that.

2 Let me ask you this, have you had the opportunity
3 to visit with your mother about this issue?

4 A. You read that paper?

5 Q. I did.

6 A. Does that answer your question? I haven't seen my
7 mom -- this is the first time I've laid eyes on my mom in
8 eleven years, and TDC does not allow me to see my family.

9 Q. Have you -- I know -- I've read -- have you
10 engaged in written communication with her?

11 A. I've engaged with her. I told her. I told my
12 family, everybody over there on that side, you know.
13 There's people that I've written, support me. Some of them
14 don't agree with my decision, they don't understand, but
15 some of them do understand, you know. But I've done
16 procedures in TDC. I've done the grievance procedures.
17 I've tried to talk to counsel. I've tried to talk to
18 wardens, you know. Doesn't nothing work.

19 And, you know, besides that, it's -- a little bit
20 of visitation of my family, not being able to see my loved
21 ones, but overall, it's -- I'm afraid I'll hurt somebody
22 again.

23 Q. I understand that.

24 Let me ask you this: None of us makes decisions
25 on our own. We're always getting either advice from people

1 or taking into consideration other people's interests and
2 feelings. And what you've just told me at the end of this,
3 is that there is someone whose -- who you take very
4 seriously their opinion, and that they would have the
5 ability to influence you potentially in the decision you're
6 making.

7 And I hear you also telling me that you don't
8 believe you've had a full opportunity to consult that
9 person, to talk with that person, to hear what she thinks
10 or -- go ahead.

11 A. When I got busted with the cell phone on death
12 row, all my outgoing mail, it's restricted. It goes out to
13 the mail room, officers pick it up in my door, it goes in
14 the bag, mail room takes it, gives it to the warden's
15 secretary, Senior Warden Harris. From Harris it gets
16 scanned. It goes to Director Lorie Davis' office and they
17 approve -- once they approve of my letters, then it gets
18 mailed. So you're talking weeks, two weeks.

19 You know, when is enough enough?

20 Q. I get that.

21 Here's the position I'm in. I'm hearing you say
22 there's a person who is present in this courtroom who --
23 whose opinion you would respect and might have an impact on
24 the decision that you're making and you haven't had a full
25 opportunity to find out what that is.

1 It's unlikely, and you can't expect that she's
2 going to stand up in court --

3 A. No. No. You know, actually, you know, what I can
4 tell you first, I've -- my mom, you don't scare my mom. My
5 mom wants to say something, she'll stand up and talk.
6 Right? But it's -- she knows what I'm doing. I've talked
7 through letters and my spiritual adviser and certain
8 attorneys, you know, my counsel, letting them know, you
9 know, hey, I want to drop. And I've written her in advance
10 and told her don't discuss anything with my attorneys, this
11 is what I want to do.

12 And she's told me through letters and this
13 shout-out -- this shout-out religious station that I listen
14 to on Saturdays that she loves me and she supports my
15 decision and she'll stand behind me. But have I had a
16 one-on-one with her? No. I've had conversation through
17 correspondence since I started writing you about doing this.
18 For almost a year.

19 My family stands behind me but, yet, like I tell
20 you in that letter, no parent wants to see their child die
21 but at the same time she understands that I take and accept
22 my responsibility. My actions put us here. She understands
23 that.

24 But if she were to tell me right now, she stood up
25 and screamed in this courtroom and told me not to do it, you

1 think I got the -- I got the guts to tell my mama no? Hell
2 no. Nah.

3 Q. Okay. Thank you, sir.

4 I think what we're going to do now is -- again
5 you'll have an opportunity to speak again -- but what I
6 would like to do now is give any of the lawyers an
7 opportunity to ask questions of Mr. Tabler.

8 Counsel, do you have any questions that you would
9 like to ask your client?

10 MR. NOLAN: Can I just have one moment, Your
11 Honor?

12 THE COURT: Sure.

13 MR. NOLAN: Not at this time.

14 THE COURT: Okay, Ms. Patton?

15 MS. PATTON: No questions, Your Honor.

16 THE COURT: Okay, thank you.

17 So I think let's move into the next part of the
18 hearing where we will hear from Dr. Arambula.

19 If you can call Dr. Arambula.

20 If you can come forward.

21 MR. NOLAN: Your Honor, could I just note for the
22 record that we have three experts in the room as well,
23 Dr. Dudley, Dr. Martell, and Dr. Curry.

24 THE COURT: Is there any issue with invoking the
25 rule?

1 MS. PATTON: No, Your Honor.

2 THE COURT: All right, thank you very much.

3 Dr. Arambula, good morning.

4 Please walk around the corner there. It's a long
5 walk.

6 Could you raise your right hand to be sworn,
7 please.

8 MICHAEL ARAMBULA,
9 was called as a witness and, having been first duly sworn,
10 testified as follows:

11 THE WITNESS: I do.

12 THE COURT: Thank you. Be seated.

13 =====
14 EXAMINATION
=====

15 BY THE COURT:

16 Q. Could you state your name for the record, please.

17 A. My name is Dr. Michael Arambula.

18 Q. Dr. Arambula, I don't think there's any dispute
19 about your credentials as an expert, but just for the record
20 could you briefly explain your qualifications.

21 A. Sure. I attended the University of Texas at
22 Austin. I received two degrees from the College of
23 Pharmacy. The first was a bachelor of science in pharmacy
24 and then I later received a doctor of pharmacy.

25 I attended medical school in San Antonio. I

1 received my M.D. degree from the University of Texas Health
2 Science Center at San Antonio. I also remained at that
3 institution for my general internship and then specialty
4 training in psychiatry.

5 when I completed psychiatry residency training in
6 '91, I spent a year in fellowship training at Rush Medical
7 College and I was in the subspecialty of forensic
8 psychiatry. I completed that at the end of June '92 and
9 then I've been back home ever since.

10 Q. Have you had occasion to prepare expert reports
11 for courts such as this in the past?

12 A. I have, yes.

13 Q. And including competency evaluations as I have
14 asked you to do in this case?

15 A. Yes, including one very similar to Mr. Tabler's
16 case several years ago.

17 Q. Okay. Can you tell me approximately how many
18 times you have been asked by a court to render an expert
19 opinion?

20 A. I would say, over twenty years, it's probably been
21 hundreds of cases where I've either written a report for a
22 court and/or testified.

23 Q. And have you testified both at the behest of
24 courts and individual clients?

25 A. Yes.

1 Q. And do you restrict your availability to either
2 one side or the other?

3 A. No.

4 Q. And have you rendered opinions that are contrary
5 to the purported interests of the side that asked you to do
6 the report?

7 A. Run that by me again.

8 Q. So, in other words, if you are hired by one side
9 have you rendered opinions that do not necessarily favor
10 that side?

11 A. That has happened before, yes.

12 Q. Okay. Thank you.

13 All right, so, as you know, I have asked you to
14 essentially determine two things, first of all whether
15 Mr. Tabler has the capacity to appreciate his position and
16 make a rational choice with respect to continuing or
17 abandoning further litigation; and, second, whether he's
18 suffering from a mental disease, disorder or defect which
19 would substantially affect his capacity such that it
20 prevents him from understanding his legal position and the
21 options available to him and prevents him from making a
22 rational choice among his options.

23 To that end you submitted a report on May the
24 28th of this year which provided -- which has been provided
25 to counsel for both parties and has been made part of the

1 record, so if I could now first ask what you did when you
2 embarked on the task of evaluating Mr. Tabler?

3 A. Prior to my face-to-face evaluation with
4 Mr. Tabler, I received a multitude of records that were sent
5 to me by the Attorney General's Office and by the Federal
6 Public Defender's Office.

7 Some of the records from the Federal Public
8 Defender's Office were duplicative so I didn't review those,
9 but I picked up essentially where I had left off from my
10 record review that I received from the Attorney General.

11 Once I reviewed all of those records then I made
12 arrangements to see Mr. Tabler at the Polunsky Unit and I
13 conducted a general psychiatric/forensic evaluation of him
14 that lasted about three -- a little over three and a half
15 hours.

16 During the course of my evaluation I covered
17 information much like I would seeing a patient in my office.
18 And then, forensic-wise, then I addressed the issues that
19 you asked me to explore and identify on your court order.

20 So, I covered developmental history, social
21 history, academic history, occupational history, what his
22 relationships were like with other people.

23 I covered what types of medical history he had,
24 whether he had had any surgeries, what types of mental
25 illness history he had, including times that he had been

1 intoxicated with drugs and/or alcohol.

2 I looked -- I covered some of his offenses as they
3 related to -- may or may not have related to his mental
4 condition during the years preceding this capital murder
5 charge and then later conviction.

6 Throughout that time I was observing him to look
7 for how he communicated, what his thought processes were,
8 his attention span, his concentration, whether there were
9 unusual thoughts that might be related to an underlying
10 mental illness. Of course I covered his recent history
11 regarding things like how he was sleeping, his mood, energy,
12 issues like that as well.

13 And then, because I'm -- my role -- I perceive my
14 role as a psychiatrist, I looked at how mental condition
15 might affect the issues that you asked me to evaluate. But
16 beyond that, because I recognize your purview is much larger
17 than mine, I tried to include other general conversation,
18 general information that Mr. Tabler reported to me that
19 might address the issues of voluntariness and knowledge of
20 what was going to happen.

21 So essentially I collected that, put it in my
22 report, and what -- what I focused on, knowing what type of
23 mental conditions he had been diagnosed with, was I looked
24 to see over the course of his life and more recently in
25 these last several years, what mental condition was

1 symptomatically active such that the issue of self-injurious
2 behavior, which has been pretty much present off and on
3 throughout his entire life, whether his request to waive his
4 waiver was attached to that self-injurious behavior knowing
5 that that was attached to his underlying personality
6 disorder. And that's what my focus ultimately became during
7 the course of my evaluation and the methodology that I used.

8 Q. In other words, if I'm understanding you, whether
9 or not the decision that he's making now is sort of a
10 magnified extension of previous self-harming behavior?

11 A. Exactly.

12 And with that, I -- we spoke about anger, even now
13 and with me and I knew that he had anger issues before but
14 previously he was not able to control his behavior very well
15 because he was so worked up and so I looked at that issue as
16 well because I understood he was angry and dissatisfied with
17 the conditions that he was living in.

18 I collected information that balanced some of that
19 but I nevertheless recognized and accepted what he told me
20 was accurate, but he was not acting upon that like he had
21 before when he was more symptomatic.

22 Q. All right.

23 So backing up, let me ask in terms of your
24 evaluation generally, do you believe you've had access to
25 all the materials about his background, his medical history,

1 his behavioral history? Did you have access to all the
2 materials that you would expected to have access to in
3 making an evaluation like this?

4 A. Yes.

5 Q. All right. Did you have a sufficient opportunity,
6 in your mind, to have a face-to-face encounter with him that
7 was sufficient for the purposes of your evaluation?

8 A. Yes. Yes, Your Honor.

9 Q. In any respect were you limited or did you not
10 have sufficient information to render an opinion in this
11 case?

12 A. I did not feel I was in that position by the time
13 I left.

14 I was curious as to how he would behave after and
15 what would happen, and to date I haven't received any
16 information from either side that my evaluation and our
17 discussion caused any kind of symptomatic deterioration.

18 Q. Let me ask you this: You've heard him speak quite
19 a bit today. Is there anything that you've heard today in
20 his responses to me or his affect or anything else that
21 would cause you to doubt any of the conclusions that you
22 have made in your report?

23 A. No. No, Your Honor.

24 Q. Is everything you've seen today consistent with
25 the expressions that he -- of his desires that he made to

1 you when he talked to you?

2 A. Yes. He was -- what I observed in the back of the
3 courtroom -- a little more impatient today than what he was
4 with me but nothing that was significantly concerning to me.
5 It could be the stress of being here in the courtroom and I
6 understand that.

7 Q. Sure. Okay. Thank you.

8 So let me ask then, in your professional opinion,
9 does Mr. Tabler have a rational understanding of his legal
10 position and the options available to him?

11 A. Yes, Your Honor.

12 Q. Does he have the capacity to rationally choose to
13 abandon the proceedings that we've talked about today?

14 A. Yes, he does.

15 Q. As you know, Doctor, Mr. Tabler has previously
16 vacillated between a desire to waive further appeals or
17 proceedings and there's been some question about whether or
18 not he has changed his mind.

19 Did you factor that in -- did you factor those
20 reports into your conclusion about what's going on today?

21 A. Yes. And, again, I looked at what his clinical
22 course had been like since his conviction -- clinical course
23 meaning how symptomatic he was.

24 He had four hospitalizations between I believe it
25 was 2000 -- I think it was 2006 to 2012, something.

1 There were episodes of self-injurious behavior.
2 He was very angry, upset. So I looked at that clinical
3 course and when he wanted to start to waive his rights in
4 '08. He was still somewhat symptomatic at that time.

5 And so I looked at that clinical course that I
6 reviewed in his records along with that vacillation that I
7 was well aware of and I focused on the records and per his
8 self-reporting these last few years that there had been
9 times when he was not as symptomatic -- he's not always
10 symptomatic -- and those were times where he could decide
11 one way or another and he maintained his position that he
12 wanted to waive his appeal rights.

13 Q. As a result of that, do you believe that the
14 decision that he has consistently expressed recently, that
15 that has -- that he has maintained over time, including here
16 in court today, that you can have confidence that that is a
17 genuine desire on his part?

18 A. Yes.

19 Q. Is there anything that leads you to doubt his
20 understanding of the permanence of the decision that he's
21 making?

22 A. No, Your Honor.

23 Q. All right.

24 Is there anything that we haven't talked about so
25 far that you would like to add to your report or explain to

1 me today? Or anything that Mr. Tabler has said?

2 A. So my -- while I would like to add that my
3 interview style is not to ask: Do you feel this way or that
4 way, and so instead I follow somebody's conversation. I ask
5 them what they mean by this or that and so I try to go
6 several levels down. I know that sometimes individuals can
7 be rehearsed in their mind for an evaluation and so I try to
8 disentangle that.

9 It became -- it became apparent to me during my
10 evaluation of him that there had been a change in
11 Mr. Tabler. I called it a maturity of some sorts. And
12 clinical research supports that personality disorders,
13 individuals who have personality disorders, can mature by
14 the third and fourth decade of life and sometimes later, it
15 just depends on the individual. And that's what he
16 demonstrated by looking at his records and by the discussion
17 we had.

18 He's more spiritual. He talked about several
19 Bible passages. I didn't know what they were but I asked
20 him about one area in the Bible and he was able to talk
21 about that even though he hadn't cited it for me as if --
22 I'm not saying it was rehearsed, these passages, but I
23 picked something out that I was aware of having gone to
24 Catholic school for a lot of years, and he was able to talk
25 about that and so I felt like he was genuine in his desire

1 to waive his appeals for a multitude of reasons.

2 Q. Thank you.

3 Another thing that I would like for you to help me
4 disentangle if you can, that is that he has expressed in the
5 past and today a frustration with the conditions of his
6 confinement and indicated that that is -- identified that as
7 a factor in his decision to end the proceedings.

8 From your point of view, can you disentangle the
9 frustration that he has with those circumstances from the
10 sort of expression that he is voluntarily making this
11 decision?

12 In other words, does his expression of his
13 frustration with his confinement concern you from a medical
14 or mental-health perspective about whether or not those
15 things are in any sense overriding an independent judgment
16 about the best thing to do in this case?

17 A. Right. Okay.

18 So, again, my methodology focused on the
19 symptomatic course of largely his personality pathology
20 because in the past when his personality pathology was in
21 duress, under duress or crisis, that's when he was violent
22 and/or self-injurious, and so I looked to see what was going
23 on in relation to his frustrations with the system.

24 He acknowledged that he created this bed, so to
25 say, for himself and so, I perceived that some of his

1 frustration was because of how he was treated but also
2 because of the bed that he made for himself.

3 Those areas I included in my report, in my
4 discussion. I did not feel that they were causally related
5 to the presence of a symptomatic mental condition that would
6 substantially interfere with his capacity to waive his
7 rights.

8 But, again, knowing that your purview is much
9 larger than mine, I included that for your consideration.
10 And, for example, I asked him about what are the options for
11 him. He mewed that he could possibly get a new trial,
12 although it was slim to none in his mind, and that he could
13 get life without parole but he reasoned that given his
14 history of being assaultive when he was ill during his
15 younger years that that could follow him and he could be
16 placed in ad. seg. once again and it would be similar to
17 death row.

18 His ability to help other inmates adjust to prison
19 was somewhat hampered by being in ad. seg., being in death
20 row and those circumstances so I -- like I said, I didn't
21 feel I was attached to a symptomatic mental condition but I
22 wanted it included in my report for your consideration
23 regarding voluntariness.

24 Q. Thank you very much.

25 So in summary, Dr. Arambula, is it your

1 professional opinion that Mr. Tabler is competent to
2 determine whether or not to waive his further appeals and
3 his right to counsel?

4 A. Yes.

5 Q. And do you believe that that -- is there any
6 reason to doubt that that decision is being made
7 voluntarily?

8 A. I do not have a clinical or medical reason to
9 doubt that.

10 THE COURT: Okay. Thank you very much.

11 Counsel, do you have any questions?

12 MR. NOLAN: I presume you'd like me at the podium?

13 THE COURT: Please. Thank you.

14 MR. NOLAN: Your Honor, just a bit of housekeeping
15 to let you know we had premarked some exhibits and have them
16 bound, which are in front of you.

17 In reviewing things since Thursday, we came upon
18 about ten or so additional exhibits that we would like to
19 move in, and basically those exhibits are small portions of
20 the exhibit list that we've submitted to Your Honor.

21 There was one through five, which are not
22 contained there because there were thousands and thousands
23 of pages and we didn't want to reproduce all of that, so
24 what we did is we pulled out small sections of those and
25 we'll add them as we go.

1 THE COURT: Okay, thank you.

2 And just for purposes of the record, I have before
3 me 1 through -- or actually 6 through 64. Are these agreed
4 exhibits? Have you produced these to the State?

5 MR. NOLAN: Yes.

6 (Whereupon, Petitioner's Exhibit Nos.
7 6-64 were offered.)

8 THE COURT: Any objection to the admission of any
9 of these exhibits?

10 MS. PATTON: Judge, I think as we indicated in our
11 response to the Motion to Extend, the Director is not taking
12 a position on whether or not Mr. Tabler is competent or is
13 voluntarily waiving his proceedings, therefore, we are not
14 going to challenge the evidence that's proposed to be
15 submitted by Mr. Tabler's attorney.

16 We just want to clarify that that is simply for
17 the sole purposes of this hearing and not for any other
18 proceedings or any other purposes.

19 THE COURT: With that limited purpose they are
20 admitted. Thank you.

21 (Whereupon, Petitioner's Exhibit Nos.
22 6-64 were received in evidence.)

23 MR. NOLAN: Thank you, Your Honor.
24
25

=====

CROSS-EXAMINATION

=====

BY MR. NOLAN:

Q. Good morning --

A. Good morning.

Q. -- Dr. Arambula.

Did you submit an invoice in the case? We -- I know the State got one but we didn't get it. I was curious if you just had a copy with you?

A. I do not. I believe I submitted it to the AG office.

Q. Okay. Do you -- approximately how many hours were included in your invoice?

A. I don't recall. Sorry.

Q. You spent three and a half hours with Mr. Tabler; is that right?

A. Yes, sir.

Q. Now, your degree is in -- your doctorate is in pharmacy?

A. One of my doctorates is in pharmacy, yes.

Q. And so in your typical work do you -- you focus on medicine though in a lot of ways, being a person who specializes in pharmacy; and then what is your other degree in?

A. I'm a physician, so I'm a medical doctor. I do --

1 majority of my patients I conduct -- I utilize psychotherapy
2 so I don't just use medications.

3 Q. Okay.

4 A. I use both.

5 Q. Now you -- I'm sorry?

6 A. I use both.

7 Q. Both. Okay.

8 So you said in direct examination that you had
9 another case similar to this?

10 A. Yes.

11 Q. What case was that?

12 A. That was a case -- I don't remember the
13 gentleman's first name. It was Mr. Martinez and it was in
14 Judge Biery's court several years ago. It was a waiver of
15 appeals also.

16 Q. And in that case were you retained by the court as
17 you were in this case or by one side or the other?

18 A. By Judge Biery, yes.

19 Q. And were your findings in that case that he was
20 competent to waive?

21 A. Yes, sir.

22 Q. And voluntary?

23 A. Yes, sir.

24 Q. That his decision was voluntary?

25 A. I addressed the issues regarding capacity, and

1 again, similarly collected information regarding
2 voluntariness and knowledge.

3 Q. So let me clarify that. You use -- in your report
4 you use the word "capacity"?

5 A. Right.

6 Q. For the most part, correct?

7 A. Yes.

8 Q. All right. So you're not really addressing
9 voluntariness then?

10 A. I address it to some degree. And, for instance,
11 if somebody is ill, mentally ill, and they perceive an
12 injustice or an unfairness related to paranoia, for example,
13 a psychotic symptom, then I would look at that as an issue
14 to examine regarding voluntariness.

15 Beyond symptomatic mental illness, however, there
16 are circumstances in the environment that could address
17 voluntariness that I include in my reports and my
18 evaluations for consideration by the Court, but,
19 essentially, it's not tied into mental condition.

20 Q. I see. So it's not tied into a mental condition,
21 but, in other words, what we've been talking about this
22 morning are the conditions of confinement, for example, of
23 Mr. Tabler, correct?

24 A. That's one area, yes, sir.

25 Q. And that you include in your report because that

1 could impact the question of voluntariness; is that fair to
2 say?

3 A. That Judge Pitman might find useful in his
4 deliberations.

5 Q. In his deliberation in determining voluntariness,
6 correct?

7 A. Yes, correct.

8 Q. And another area of interest would be the fact
9 that Mr. Tabler has not been able to see his mother in
10 eleven years, for example. That could be something that
11 ultimately could be -- impact the question of voluntariness;
12 is that fair to say?

13 A. We talked about that issue and so we covered it
14 regarding voluntariness, yes.

15 Q. You've heard Mr. Tabler say today that if his
16 mother stood up and told him not to waive, that he would not
17 waive; is that right?

18 A. I did.

19 Q. So you're aware that his attachment to his mother
20 is extremely intense, correct?

21 A. I would agree with that, yes.

22 Q. Okay. Now, another thing that you said on
23 examination by the Court was that you had a discussion with
24 Mr. Tabler about his options and one of his options, you
25 mentioned, is that life without parole, correct?

1 A. Correct.

2 Q. Are you aware at the time that this crime happened
3 there was not life without parole in Texas?

4 A. I was not aware of that timing.

5 Q. In the conversation you had with Mr. Tabler about
6 that, his concern was that if he was put in general
7 population with a life sentence, he would be kept in ad.
8 seg. correct? Isn't that what he said?

9 A. That was one of the reasons. He didn't want to
10 spend the rest of his life in prison and the other was
11 that -- because I -- in our -- in our discussion I said,
12 well, you could be in general population. He said, well,
13 maybe not because of my history. And so that's the part I
14 wrote down. I don't write down my questions or my
15 inquiries.

16 Q. So, again, you included that information in your
17 report because that is something that could impact on the
18 question of voluntariness of his decision; is that fair to
19 say?

20 A. Yes.

21 Q. Now, you're aware that Mr. Tabler is held in a --
22 in the death-watch section of the prison; is that right?

23 A. That's what he told me, yes.

24 Q. That's what he told you,. but did you look at the
25 records?

1 A. Yes, I did.

2 Q. So they indicate that he's in the death watch,
3 it's not just what he told you --

4 A. Right.

5 Q. -- correct?

6 A. Correct.

7 Q. So you're aware that in that situation where he is
8 housed, he's under twenty-four-hour surveillance by camera
9 and sometimes physically by guards standing inside of his
10 cell, correct?

11 A. That's what I learned of, yes.

12 Q. You learned that from him as well as the records?

13 A. Correct.

14 Q. Do you know how long he's been in this situation?

15 A. It's -- it depended on his behavior, is what he
16 remarked. I don't remember the timing of when he was on
17 death watch versus non-death watch.

18 He talked about different pods within the
19 death-row system that someone would be transferred to, for
20 example, depending upon their behavior. But the incident in
21 2008, I know that -- I timed that that's when most of this
22 occurred.

23 Q. So since 2008 when that incident occurred, isn't
24 it fair to say that he's been on death watch; isn't that
25 right?

1 A. He's been on it a fair amount, yes. I don't know
2 exactly how long over the years.

3 Q. Well, when you looked at the records and you see
4 that he's always been on death watch since 2008, for over
5 ten years, or did you just not review them that closely?

6 A. I can't recall whether he's been in the same cell.

7 He talked -- during our discussion he talked about
8 being moved, I want to say it's maybe months to years after
9 this 2008 incident, and he was moved to a different part of
10 death row and so that's -- that's as best as I can answer
11 you.

12 Q. Do you know that death watch is the place where
13 people are sent once they have an execution date set in
14 Texas? Are you aware of that?

15 A. I learned that from Mr. Tabler, yes.

16 Q. Okay. And so -- and Mr. Tabler, are you aware, is
17 the only person without an execution date who is always on
18 death watch? Are you aware of that?

19 A. He spoke about that, yes.

20 Q. And did he also speak about the fact that he is in
21 that situation and the only people that are around him, the
22 only inmates that are around him, are people who are getting
23 ready to be executed; is that right? Did he talk about
24 that?

25 A. Yes, he did.

1 Q. And you also reviewed -- there's a pile of
2 exhibits in front of you. We may go through some of them?
3 But you've reviewed all of these exhibits?

4 A. I did.

5 Q. And you've seen motion after motion where he
6 describes the impact of making connections with people on
7 death watch and then watching them get taken to their death;
8 isn't that right?

9 A. We talked about that as well.

10 Q. You talked of that as well?

11 A. Yes.

12 Q. So you included that in your report even though
13 it's not a mental illness according to you, right?

14 A. Well, I included it, not related to symptomatic
15 mental condition, but as extra information for Judge Pitman
16 to consider.

17 Q. And the reason you included that, again, is
18 because it's relevant to the question of whether he's making
19 a voluntary decision, correct?

20 A. Per my training that's what I was taught to do,
21 yes.

22 Q. Okay. Now do you know who Vic Tai is?

23 A. I -- I don't know who he is, but I remember the
24 name.

25 Q. So in your report at one point you said that in

1 your conversation with Mr. Tabler, you talked about an
2 inmate who he was close to who was executed?

3 A. Yes.

4 Q. And that was Vic Tai?

5 A. Yes, sir.

6 Q. Is that --

7 A. I didn't want to put a number in there out of
8 respect for him.

9 Q. Totally fair.

10 And Mr. Tabler talked to you about how close he
11 was to Vic Tai --

12 A. Yes.

13 Q. -- correct?

14 And you know that Vic Tai was executed in July of
15 this year, correct? Did he talk about that?

16 A. I just know that it was -- I remember it was -- it
17 was July of this year? You mean in the last few days?

18 Q. No, I'm sorry. No, no, no. My apologies. July
19 of 2017.

20 A. Yes, I do remember that.

21 Q. And it was two months after that that Mr. Tabler
22 wrote the motion in this case or the motion that we're
23 dealing with at this point asking to give up his appeal
24 rights, do you recall that?

25 A. I've seen a number of motions on different dates.

1 Q. I would ask you to look at Exhibit 51 in those
2 exhibit packs in front of you.

3 A. Okay.

4 Q. Are you with me, Doctor?

5 A. Yes, sir.

6 MR. NOLAN: May I have a moment, Your Honor?

7 Q. (By Mr. Nolan) Do you see in that motion
8 Mr. Tabler specifically mentions his friend?

9 A. Yes.

10 Q. Is that right?

11 And so again, Dr. Arambula, you included this
12 information because you believed it would be relevant to the
13 Court's decision in determining whether or not Mr. Tabler's
14 decisions are voluntary; is that fair to say?

15 A. Per my training it could be relevant to Judge
16 Pitman but not from my perspective because, again, I was
17 looking for whether this had a causally related relationship
18 to symptomatic mental condition and I didn't find one but I,
19 nevertheless, wanted to include that information for
20 consideration.

21 Q. Even if someone is not actively psychotic, at the
22 time you're making decisions, outside influences can affect
23 the question of voluntariness; isn't that fair to say?

24 A. When someone's mental condition, in this case his
25 primary condition being personality pathology, there are

1 times when he has struggled with mood instability,
2 depressive symptoms over the short term under duress. And
3 so, again, I looked for that in relation to what his
4 symptomatic course has been like in relation to what his
5 desire is to waive his appeals.

6 Q. You said suffered from mood instability in the
7 short-term?

8 A. Right.

9 Q. You've seen a lot of records in this case, haven't
10 you, Doctor?

11 A. I have.

12 Q. Did you read Dr. Dudley's report?

13 A. Yes, that was -- let's see, Dudley? Yes.

14 Q. Dr. Dudley is a psychiatrist who was retained by
15 my office and he talks about longstanding chronic mood
16 disorder and depression, correct?

17 A. It's -- I don't recall his verbiage. I'm aware
18 that there has been longstanding waxing and waning mood
19 disturbance that's sometimes very active and sometimes not
20 symptomatic.

21 Q. Now --

22 MR. NOLAN: Excuse me, Your Honor.

23 Q. (By Mr. Nolan) And you're also aware, Doctor,
24 that since Mr. Tabler has been incarcerated there have been
25 numerous incidents of self-harm, things like that; is that

1 correct?

2 A. Yes, sir.

3 Q. I'd just like to put a few of those into the
4 record if I could use you to do that.

5 A. Sure.

6 Q. I've premarked Exhibit 65 which has been provided
7 to the State.

8 MR. NOLAN: And again, Your Honor, these are from
9 those big piles of records that we just pulled out.

10 May I approach?

11 THE COURT: You may.

12 Q. (By Mr. Nolan) Now the date on this, just so
13 we're clear -- this is a record that you have seen before,
14 right? You've seen all of the health service's archived
15 records?

16 A. I don't remember this specific one but I've looked
17 through all of them.

18 Q. Okay. So this was dated October 14, 2013?

19 A. Yes, sir.

20 Q. And can you just read under nursing visit 0800.
21 Read out loud. It starts, "S" and then "08."

22 A. Which one did you want me to read? S --

23 Q. I'm sorry, just read the small portion underneath
24 Nursing Visit.

25 A. Okay. This is subjective and it's in quotes, "I

1 feel really stressed. I need an injection. If they
2 discharge me, I'm going back to my unit and doing it," end
3 quote.

4 The objective: Patient is very anxious, pacing in
5 his cell, stating that he is trying not to hurt himself
6 because he said he wouldn't to staff. He is requesting to
7 get an injection to help calm down. He is worried he will
8 get out of control. This information was given to his
9 provider.

10 Q. All right. So that is something, also, when you
11 consider all of these records that you have considered in
12 your overall opinion, is this kind of situation that
13 Mr. Tabler has where he goes through these ups and downs in
14 the prison; is that fair to say?

15 A. Yes, sir.

16 Q. Okay. What's been premarked 66.

17 MR. NOLAN: May I approach, Your Honor?

18 THE COURT: Yes. You don't have to ask.

19 MR. NOLAN: Thank you.

20 Q. (By Mr. Nolan) This, again, is the nursing visit
21 progress note; is that correct, Doctor?

22 A. Yes.

23 Q. And can you just read under nursing visit 825, it
24 says "S," and what does it say there?

25 A. The subjective, in quotes, "I'm depressed with

1 suicidal thoughts," end quotes.

2 And under objective, "Patient is standing at cell
3 door, respiration is even and unlabored. He's alert with
4 fair eye contact. He has a depressed mood and flat affect.
5 He is talking about the effects of other death-row people
6 being put to death and how he lost his appeal. He states he
7 can't stop thinking about it. He has no current plan to
8 hurt himself."

9 Q. So, again, Mr. Tabler, at this point, is talking
10 about the impact of being on death watch and watching these
11 other individuals being taken out repeatedly and executed;
12 is that right?

13 A. That's one of them, yes.

14 Q. I would ask to show you what's been premarked
15 Number 67. Now, this is a correction's Managed Care
16 Inpatient Mental Health Services from October 17th, 2013; is
17 that right, Doctor?

18 A. Yes, sir.

19 Q. Now, if you would look under "Today he reported."

20 A. Okay.

21 Q. Can you just read that for the record, please.

22 A. Sure. "Mr. Tabler is a 34 year old Caucasian male
23 who came from TL Unit to J4 on October 4th after expressing
24 a history of feeling sad, depressed and alone. He says that
25 he wanted to kill himself and had the means to do so.

1 "He attained some razor blades at his unit and
2 planned to slit his throat from ear to ear but he did not
3 attempt suicide because he did not want to kill himself in
4 the day room.

5 "He says that his problem stems from his
6 high-security housing. He is housed in the death-watch unit
7 and has seen forty death-row inmates executed during his
8 incarceration. He says that he has also been experiencing
9 explosive" -- it's supposed to be rage not range, I
10 presume" -- and anger that is uncontrollable.

11 "He had thoughts of trying to hurt an officer
12 after she told him he was the cause for the cameras and the
13 high security that everyone had to deal with in prison. He
14 says that the officer yelled at him and he snapped and
15 blacked out."

16 Q. Now, Dr. Arambula, when you were examining
17 Mr. Tabler, did you look at his arms?

18 A. I didn't exam--- I didn't, like, ask him to show
19 me his arms.

20 Q. Do you remember if he had long sleeves on?

21 A. I believe that he had long sleeves. I would have
22 noticed in -- I would have remembered right away of seeing
23 all the scars if he had short sleeves on and I don't
24 remember that.

25 Q. But you don't doubt that he's cut himself

1 numerous, numerous times?

2 A. Not at all. It's explicitly described in the
3 records over many years.

4 Q. Now, in your report and I think on direct
5 examination or on examination by the Court -- I'm not sure
6 what to call that, Doctor. My apologies.

7 On examination by the Court you said that he had
8 four hospitalizations between 2006 and 2012; is that right?

9 A. Yes, sir. Five, actually.

10 Q. Five, okay. You had said four.

11 There were -- there was also a hospitalization in
12 2015, much closer in time. Were you aware of that?

13 A. I don't remember seeing that one off the top of my
14 head or -- right.

15 Q. Right.

16 I'm going to show you what's been premarked
17 Exhibit 68.

18 A. Okay.

19 Q. Did you see that report before? It was in the
20 materials provided to you.

21 THE COURT: Mr. Nolan, could I interrupt a second.
22 I'm not sure that it's the most efficient way for us to go
23 through this by having a witness read extensive --

24 MR. NOLAN: I wasn't going to have him.

25 THE COURT: Okay, a sentence or two is fine, but

1 if in the future you have these exhibits and want him to
2 read them to himself and then comment that would be more
3 efficient.

4 MR. NOLAN: That's fine, Your Honor.

5 THE WITNESS: Yes, it looks familiar.

6 Q. (By Mr. Nolan) So this indicates that he was also
7 hospitalized as recently as August of 2015, correct?

8 A. Yes, for crisis management.

9 Q. Okay. And so that means at that time, would you
10 agree with me that he wasn't symptomatic?

11 A. He was complaining of suicidal ideations. I don't
12 recall that he did anything about it but I know that they
13 sometimes referred him to Jester IV when he complained about
14 suicidal ideation and he hadn't done anything to himself and
15 other times he had.

16 Q. Well, you were saying previously that your opinion
17 is based on whether or not he is symptomatic in terms of his
18 personality disorders that you've found, correct?

19 A. Whether he is symptomatic -- sufficiently
20 symptomatic that it affects his mood and/or his thought
21 processes that would then substantially interfere with his
22 capacity to understand and appreciate the circumstances and
23 his options that we're currently talking about. So I looked
24 at it in that long perspective.

25 Q. So would you agree with me that in 2015, at least,

1 the prison people thought he was symptomatic enough to send
2 him to the hospital?

3 A. Correct.

4 Q. And so if you were making an opinion about whether
5 or not Mr. Tabler could waive his rights in 2015, would your
6 opinion be different if you reviewed the records of the
7 symptomatology of the personality disorders at that time?

8 A. With the backdrop of symptomatic, self-injurious
9 behavior it would be difficult. It's possible, and I don't
10 know what it would be, turn out to be. Upon further
11 exploration there could be an answer that I could then
12 identify at this particular date regarding his waiver.

13 Q. Okay. Now, if we -- I want to get back to the
14 other individuals. Mr. Tabler being consistently on death
15 watch and watching other individuals being executed, you
16 would agree with me -- strike that.

17 I'm going to show you what's been premarked --

18 MR. NOLAN: I'm sorry, Your Honor, if I could have
19 a moment? This is premarked Number 69, Your Honor.

20 Q. (By Mr. Nolan) Now, Doctor, that's a more recent
21 nursing protocol report from June of 2017. Do you see that?

22 A. I do.

23 Q. And, again, in this -- in this report it indicates
24 that he is extremely stressed, that he's stressed with
25 having a camera on him 24-7. If the execution goes through

1 Thursday, then that would be the 68th person that he has
2 gotten to know and become friends with who have died.

3 Have you seen that report before?

4 A. Yes, it looks familiar.

5 Q. And that -- this kind of indicates a few things,
6 right? It's this lack of privacy with the cameras on him
7 all the time and this housing in death watch where he
8 repeatedly watches people that he gets to know be executed,
9 and these are things that you took into consideration,
10 Doctor; is that right?

11 A. Yes, we talked about it because I wanted to see
12 how it affected his waxing-and-waning condition during these
13 last few years and to what degree. In other words, did he
14 act out on it? Were these just feelings? Insights?
15 Thoughts? In other words, what he did with it.

16 Q. And, again, you included that information because
17 you felt that would be relevant for the Court in its
18 ultimate determination whether or not he's making a
19 voluntary decision to waive, right?

20 A. That it could be, yes, sir.

21 Q. All right. Now, Doctor, I think the Court may
22 have asked you this, but you're aware that Mr. Tabler has --
23 has gone through a series of waivers and then retraction of
24 those waivers over the years; is that right?

25 A. Yes.

1 Q. And you've reviewed the motions -- there were a
2 lot of motions that were sent to you, I believe, and you
3 reviewed all those?

4 A. Yes, sir.

5 Q. So you saw the correspondence? You saw the
6 motions that went back and forth, in terms of waiving rights
7 and then deciding to take back the waiver, and all those --
8 a lot of those things were in writing; is that correct?

9 A. Yes, sir.

10 Q. And you're aware that that happened about ten
11 times, maybe more; is that fair to say?

12 A. I don't remember a number of times but it was
13 enough that it was noticeable to me.

14 Q. Okay. Are you aware that Mr. Tabler requested
15 mental health treatment after the current waiver that
16 started in September of 2017?

17 A. I don't specifically recall that record.

18 Q. I show you what's been marked Exhibit 70, seven
19 zero. It may not look familiar because you have reviewed a
20 lot of records, but do you see that, Doctor?

21 A. I do.

22 Q. And that's dated October 18th, 2017?

23 A. Yes, sir.

24 Q. So that's more than a month after this current
25 motion, Exhibit 51, was sent to the court asking to waive;

1 is that right?

2 A. Yes.

3 Q. And what he's asking for in his evaluation
4 counseling and treatment, the benefits of which would be the
5 improvement in mental-health diagnoses. Do you see that?

6 A. Right.

7 Q. So is it fair to say that at that point Mr. Tabler
8 is still in a situation where he is suffering from some
9 symptomatology of his disorders, or at least he perceived
10 himself to be?

11 A. This is just a request for evaluation, counseling
12 and treatment, so that's really all I can go on.

13 I know that in our discussion he talked about a
14 change that had come over him and so to where he could
15 continue to be in this better place and so this would seem
16 consistent with what he talked about with me.

17 Q. And when did you see him?

18 A. April 21st of this year.

19 Q. April?

20 A. Yes. I think it was April -- no, it was May 21st.

21 Q. All right.

22 A. May 21st.

23 Q. So this change that came over him, is that what
24 you're basing your decision on because he told you a change
25 came over him so he doesn't have these symptoms anymore?

1 A. No. My comment was that Mr. Tabler had talked
2 about this change that had come over him in the last --
3 since 2015, essentially, and this request for improvement in
4 his mental health appears to be coincident with what he
5 described to me, that's all.

6 Q. What was the change?

7 A. He couldn't -- he wasn't acting out. He was not
8 injuring himself. He was controlling his behavior. In
9 other words, he wasn't acting aggressive toward other people
10 or assaulting them. He still had these thoughts and
11 emotions that he had sometimes struggled with before but
12 they didn't affect him to where he did something about it.

13 There were plenty of times when he was frustrated,
14 angered, angered and upset but it didn't rise to the level
15 where he deteriorated and he became symptomatically unstable
16 in his mood and the way he thought.

17 Q. So you believed him when he told you that?

18 A. And it was corroborated in the records; i.e., that
19 he wasn't -- in the last few years he wasn't referred to
20 Jester for treatment.

21 Q. You thought he wasn't referred to Jester since
22 2012 but you were wrong about that, correct?

23 A. I indicated the hospitalizations, yes. I thought
24 the last date was in 2012 but it was 2015, as you pointed
25 out.

1 Q. Now, are you aware that Mr. Tabler, also in
2 February of 2018, he asked for assistance with his
3 mental-health treatment? Are you aware of that? February
4 of 2018.

5 A. I don't remember the specific record. That's very
6 possible, though. I'll take your word for it.

7 Q. I'm going to show it to you. You don't have to
8 take my word for it.

9 So, Doctor, this is dated 2-20-18, correct?

10 A. Yes.

11 Q. And Mr. Tabler in this writes, "There was
12 currently a major issue with my medication that we need to
13 address ASAP. There seems to be a misunderstanding between
14 my mental health doctor, TDCJ and myself that we need to
15 address or get fixed right away." Do you see that?

16 A. I see that.

17 Q. So, at least as far as Mr. Tabler perceives, in
18 February of 2018, he's having some mental-health distress to
19 the point where he's asking for his medication to be
20 reviewed; is that right?

21 MR. TABLER: Excuse me, Judge. Sorry to
22 interrupt, right?

23 On the incident that Shawn is speaking about --
24 Mr. Nolan is speaking about -- right -- not to get Arambula
25 confused, I did ask that -- the medication I take is

1 Benadryl for my sinuses. They were making a mistake. I had
2 been getting it in pill form in a cup. They started
3 crushing it. It has nothing to do with the psychiatric
4 medication. I take that medication for my sinuses. That's
5 why mental health gave it to me. I had to go through mental
6 health because medical couldn't issue it. The only way I
7 can get it is to get mental health to issue it. I don't
8 take it for a psychiatric problem though.

9 The problem was they were crushing up this capsule
10 and putting it in a cup of water when they had been giving
11 it to me without crushing it. That's what I wanted to fix.

12 I wasn't taking it when they crushed it because,
13 personally, I thought it tasted like shit when you pour it
14 in there. I'm not trying to drink that. I'm not trying to
15 get sick.

16 So that's what he's speaking about, so really it's
17 irrelevant what he's talking about.

18 THE COURT: Thank you.

19 MR. NOLAN: Thank you, Mr. Tabler.

20 MR. TABLER: You're welcome.

21 MR. NOLAN: I'm sorry, Your Honor, may I have a
22 moment?

23 THE COURT: Sure.

24 Q. (By Mr. Nolan) Now --

25 A. Did you want me to answer?

1 Q. I'm sorry, yes. I forgot the question.

2 A. I knew he was taking Benadryl, that's all I can
3 answer.

4 Q. But when you see that, obviously what he wrote
5 there is "I need mental-health meds," correct?

6 A. Well not necessarily because the only medication
7 that Mr. Tabler reported to me that he was taking was
8 Benadryl for his sinus problems and it's an antihistamine so
9 that's what it's used for.

10 Q. And as a doctor of pharmacology, when you look at
11 his history, do you feel that he should be medicated now
12 with something more than Benadryl?

13 A. If he's not symptomatic, it's really up to him to
14 decide whether he wants to take something prophylactically
15 to sustain his personality. But, however -- typically, as I
16 pointed out in my report, when people have severe
17 personality pathology, research has shown that acute
18 treatment interventions targeting whatever the symptoms are
19 that have emerged, that's the better way to manage someone
20 who has symptomatic personality pathology rather than
21 long-term medication.

22 Q. Now, let's go back to what we were talking about
23 was these repeated waivers and then taking the waivers back,
24 correct?

25 A. Yes.

1 Q. You're aware that twice in his history, those
2 waivers lasted as long as 14 months longer than this
3 situation. Are you aware of that?

4 A. I don't remember the amount of time. I just knew
5 there was numerous -- there was a back and forth over a
6 period of time. That's what I recall.

7 Q. Okay. Now, just to go back to another area for
8 one minute, the -- you took into account in your evaluation
9 the isolation and the psychological trauma that Mr. Tabler
10 is subject to because of his conditions of confinement; is
11 that fair to say?

12 A. That's something we covered in our discussion
13 because, again, I wanted to see whether the circumstances
14 that he was residing under affected his -- the stability of
15 his mental condition and whether he -- it made him more
16 symptomatically active, and that's what I was looking for.

17 And as I said earlier, there are times in the past
18 where, yes, he was symptomatically active but as he pointed
19 out to me and I recall from the records, he's been more
20 stable in these last few years.

21 Q. And isn't it reasonable, Doctor, that he's going
22 to be symptomatic again? Isn't it reasonable to conclude
23 that based on all of these back and forths and all of these
24 wafflings for many many years and his severe history of
25 mental illness that he's going to be symptomatic again?

1 Isn't that fair to say?

2 A. It's possible that that can happen again, and as I
3 pointed out to Judge Pitman I wanted to see what happened to
4 Mr. Tabler after my examination of him to see whether he had
5 deteriorated symptomatically because of what we discussed,
6 the pressure of the eval, which he talked about openly, and
7 to date I haven't received any information suggesting that
8 he's deteriorated because of that stressor.

9 Q. And a lot of what you're determining is based on
10 what he's told you about his symptoms at the time that you
11 visited with him for three and a half hours; is that fair to
12 say?

13 A. What he reported corroborated by what I reviewed
14 in the records.

15 Q. So let's talk about some corroboration. According
16 to you, he's not symptomatic during the past several years,
17 you said, right?

18 A. Past few years, I believe he said since 2015 he is
19 no longer engaged in any self-injurious behavior. He may
20 have had thoughts but he didn't take the next step. And I
21 haven't seen any episodes or incidents of aggression towards
22 others as well.

23 Q. Well, you heard him today talking about the danger
24 of acting out towards others, didn't you?

25 A. He recognized those emotions in him but he was

1 not -- it's not like he went after anybody in this courtroom
2 so he was -- he just knew that he had these thoughts.

3 Q. I would ask you to look at Exhibit 53 in front of
4 you.

5 A. Fifty-three?

6 Q. Fifty-three.

7 A. Okay.

8 Q. I'll give you a minute to read that.

9 A. Okay. The entire document?

10 Q. I'm sorry?

11 A. The entire document?

12 Q. It's only -- oh, it's two pages, I'm sorry.

13 A. I mean -- it's okay, I can read it.

14 Q. Let me see if I can find it.

15 So if you look at the second page maybe we can
16 move along a little quicker.

17 So, Doctor, this is in October 12th of 2017,
18 correct?

19 A. Yes, I saw that date. October -- it has to be
20 October that Mr. Tabler signed it.

21 Q. October. Okay, it was filed October 12, 2017?

22 A. Yes, sir.

23 Q. Yeah. October 5th is when it's signed, correct?

24 So you see on the second page there a few lines
25 down he talks about total isolation and "I feel I'm on the

1 very edge of a mental collapse"; is that right?

2 A. Yes.

3 Q. He says, "My mind and the very part of within me
4 is on the edge of losing all control." Do you see that?

5 A. I do.

6 Q. "I'm on the very edge of completely fucking
7 snapping on everyone in this place like a rabid dog." Do
8 you see that?

9 A. I do.

10 Q. So he recognizes at this point, in October of
11 2017, that things are not good. These are indications of
12 symptomatology of his disorder; isn't that fair to say,
13 Doctor?

14 A. As a clinician I look at this as a form of venting
15 or catharsis and even though the thoughts may appear pretty
16 rough to you, it's -- the thoughts are not so unusual given
17 my experience in treating people who have had similar
18 pathology like Mr. Tabler.

19 I look, as a clinician, to see what happens with
20 these thoughts and can an individual like Mr. Tabler express
21 them without deteriorating further by going into some sort
22 of activity either hurting somebody or hurting himself and
23 that's how I look at this.

24 So, venting is good. It's not necessarily looking
25 at this expressive of any psychotic thinking, irrational

1 thinking. These are just things that he has experienced
2 before.

3 He recognizes them now and he doesn't do anything
4 about them at this -- in these latter -- on this particular
5 date.

6 Q. But he's done things about these in the past
7 numerous times; isn't that right?

8 A. He has. Exactly.

9 Q. Even after times of, maybe as you would say, his
10 symptomatology was in remission and then it came back; isn't
11 that right? You're thinking this is venting but you don't
12 know that, do you?

13 A. That's how I perceive it. He vented to me during
14 our discussion about the things he didn't like and so I was
15 following his thinking to see if it ever became unreasonable
16 or, you know, way out there.

17 Sometimes when people are under extreme duress
18 they can't communicate effectively and their thought
19 processes are not linear and they become disjointed. I
20 didn't see that with him.

21 And when I see this, like I said, it could be --
22 it appears pretty rough to perhaps a lay eye but to my
23 clinical eye it looks like venting, given his personality
24 pathology and that he has -- more importantly he hasn't done
25 anything with it.

1 Q. In your experience, Doctor, isn't it fair to say
2 that patients often minimize or deny symptomatology?
3 Doesn't that always happen?

4 A. That can happen, sure.

5 Q. But you didn't think that that was happening here?
6 You just took him at face value, what he told you; is that
7 right?

8 A. The manner in which he talked and wrote here
9 reflects the emotion that he has, the drama -- and I'm not
10 saying that in a demeaning way.

11 The cluster B personalities are the dramatic
12 personalities compared to the other personality
13 organizations so this doesn't strike me as something that
14 doesn't -- that doesn't correlate with his underlying
15 personality pathology.

16 He is a bit dramatic and I'm not saying that in a
17 demeaning way but that's part of his personality.

18 Q. You didn't do any psychological testing, did you?

19 A. I did not.

20 Q. You didn't do any validity testing -- do you know
21 what validity testing is? To see if someone is telling you
22 things that are accurate; is that right?

23 A. The only thing I did validity-wise is to ask him
24 to explain further what he meant by something, and that's
25 per my training. If somebody has been somewhere they can

1 always tell you about it, rather than if it's just a
2 rehearsed answer and he was able to answer all of my
3 inquiries to where it appeared to me that he was open,
4 candid and his thinking was not rehearsed.

5 Q. Can you look at Exhibit Number 55, Doctor.

6 A. Okay.

7 Q. You see that's a Motion to Waive Rights and
8 Further Appeals and Volunteer for Execution; is that right?

9 A. I see that.

10 Q. That was filed with the court on October 20th,
11 2017, right?

12 A. Yes.

13 Q. And do you see that at about 5 lines down
14 Mr. Tabler writes, "Petitioner would also like to state for
15 the record that there are other things in life that are
16 worse than death, like losing one's sanity in prison or just
17 flat out going bat-shit crazy from the isolation placed on
18 the person." Do you see that?

19 A. I do.

20 Q. So again that -- his -- his discussion there of
21 the isolation and the impact that it has on him is something
22 that would be relevant to the Court's determination about
23 whether his decisions are voluntary; isn't that fair to say?

24 A. I believe that it could be a consideration for
25 Judge Pitman, sure.

1 Q. So, Doctor, is it fair to say that you're relying
2 almost exclusively on personality disorders?

3 A. The core feature is personality pathology and from
4 that emanates -- has emanated other periods of instability
5 having to do with his mood and sometimes his thinking to
6 where he expresses paranoia, hallucinations, things like
7 that when he's in crisis.

8 But it is his core pathology and that's reflected
9 in the records as well and has to do with his personality
10 pathology.

11 Q. Right. So you -- you said in your report the
12 primary diagnosis is personality disorder; correct?

13 A. Yes.

14 Q. And you're saying that the symptomatology that
15 you've seen in the records are the result of his personality
16 disorders alone; is that right?

17 A. When he's under -- when he's in crisis sometimes
18 his mood is very unstable. Sometimes his thinking is
19 unstable as well. He has -- experiences anxiety so that
20 emanates from the instability of his personality in crisis.

21 Q. But according to you that's only related to his
22 personality disorder; is that right?

23 A. It emanates from it, it's not separate and apart.
24 It emanates from it and it's sometimes aggravated -- it has
25 been aggravated by drug use.

1 Q. It's not separate and apart from what?

2 A. In other words, it's -- I explained in my report
3 that when someone is given a diagnosis that includes the
4 modifier "not otherwise specified," that infers that it's
5 related to some other mental condition.

6 In this case -- in his case -- it's been his
7 personality pathology and sometimes the presence of drug
8 abuse that has aggravated his personality pathology and then
9 he experiences symptoms of depression, sometimes he
10 experiences symptoms of mood instability, other times he
11 experiences abnormalities in his thinking, but it emanates
12 from his personality.

13 Q. So let's talk about the drug-use thing for a
14 minute because you relied heavily on this in your report,
15 the waxing and waning, states of drug intoxication can
16 elicit and mimic symptoms of anxiety --

17 (Whereupon, the reporter interrupted and
18 asked for clarification.)

19 Q. (By Mr. Nolan) I'm sorry, I'll start over.

20 "Waxing and waning, states of drug intoxication
21 can elicit or mimic symptoms of anxiety depression, mania
22 and psychosis."

23 So you're discounting those things that are in
24 reports from other doctors because of his past drug use; is
25 that right, Doctor?

1 A. Discounting what things?

2 Q. Anxiety, depression, mania, psychosis?

3 A. No. It's an explanation of how the doctors
4 describe what his progress was, i.e., that it was not
5 unusual for him to come in with a working preliminary
6 diagnosis of major depression or bipolar illness and then
7 when he was at the -- in the hospital unit over a few days
8 or a week or so they collected more information, sometimes
9 there were positive drug screens.

10 And then the clinicians qualified their
11 diagnoses -- their discharge diagnoses to depressive
12 disorder not otherwise specified, bipolar disorder not
13 otherwise specified, thought disorder not otherwise
14 specified, inferring that it wasn't a pure mental illness
15 per se.

16 And that's not anything demeaning to Mr. Tabler,
17 but that it had an external factor that made it appear as if
18 it was pure initially but, in fact, it was not.

19 Q. All right. So however, since he's been in prison
20 for a number of years yet -- now.

21 A. Right.

22 Q. And doesn't have access to drugs and he still has
23 symptomatology, the drug use from previous times can't
24 explain that, can it; is that fair to say?

25 A. It does -- it does not.

1 Q. Okay. Now, again, to get back to this, you did a
2 mental-status exam, I think, right?

3 A. Yes, sir.

4 Q. You said his intellectual functioning appeared to
5 be average; is that right --

6 A. Yes.

7 Q. -- in your report?

8 That was your impression, correct?

9 A. Right.

10 Q. You've since seen records, you know he has an IQ
11 of 80, correct?

12 A. I saw that somewhere, yes.

13 Q. And 80 is not average, correct?

14 A. No.

15 Q. It's more than one standard deviation below the
16 mean, in fact, it's low average?

17 A. That would be, if I recall correctly, borderline
18 intellectual functioning range. That was the old term for
19 it.

20 Q. Correct.

21 So your impression that his intellectual
22 functioning appeared average was wrong, wasn't it, Doctor?

23 A. No. That was based upon my conversation with him,
24 the use of his vocabulary, his knowledge of death row, what
25 happens, what he's experienced. He knew a lot about these

1 legal proceedings that I didn't expect him to spout off but
2 he appeared to be pretty up with it.

3 Q. So he appeared to you to be pretty up with it so
4 you said he has average intelligence, is that how you
5 conducted this exam?

6 A. His overall thought processes, the vocabulary he
7 used, the way he conversed with me, his knowledge, that all
8 appeared to be pretty average to me.

9 Q. Well, you didn't do any testing to check on any of
10 that, did you?

11 A. I did not, no.

12 Q. And you didn't do any testing to see whether or
13 not he was telling you the truth about anything, did you?

14 A. I don't believe there's a test for that.

15 Q. Well, you're familiar with validity tests and
16 psychological testing, correct? You rely on those things,
17 don't you?

18 A. Sometimes the MMPI can sort through that but it's
19 just one piece of the puzzle.

20 Q. Did you review Dr. Martell's report in this case?

21 A. Yes.

22 Q. Dr. Martell is a neuropsychologist?

23 A. Yes.

24 Q. And found organic brain damage, correct?

25 A. Um --

1 Q. Cognitive deficits?

2 A. -- he had a mixed picture of cognitive
3 dysfunction.

4 Q. And in looking at Dr. Martell's report, did you
5 look at the validity testing?

6 A. I don't recall specifically what validity testing
7 there was, for example on the MMPI. I don't remember that.

8 Q. So the reason I ask you that, Doctor, is because
9 in your report you say that Mr. Tabler told you that when he
10 was doing the psychological testing he wasn't really trying
11 very hard, and you put that in there to discount the
12 cognitive difficulties, didn't you?

13 A. No.

14 Q. Why did you put that in there?

15 A. Because I -- how he came across to me was
16 inconsistent with what was described in the records so I
17 asked him, what's going on? I mean I -- the records suggest
18 that you have some issues with how your thinking is, can you
19 help me out a bit? That's probably close to how -- the
20 verbiage that I used with him and then he explained what
21 went on.

22 I know psychological testing can be long. People
23 get tired, I know that. I recognize that the psychological
24 test results showed mixed results. For example, I think he
25 had problems with executive functioning on one of the tests

1 but yet his abstracting ability was intact. That didn't
2 fit.

3 But, you know, that's okay, that fit with what
4 Mr. Tabler was reporting to me, that he got tired, sometimes
5 he was distracted.

6 And so, he just explained to me why -- what his
7 performance was like and so I included it in the report to
8 factor into his overall mental condition, so I didn't
9 diagnose him with some sort of cognitive disorder.

10 Q. But you decided not to factor into his overall
11 mental condition the fact that he was tested three times by
12 three different neuropsychologists and each one of them
13 found valid results to the validity testing. You reviewed
14 those but you didn't include that in your report; isn't that
15 fair to say?

16 A. I didn't include their specific opinions. You're
17 correct.

18 Q. Now, in your report under mental status
19 examination you write, "His memory appears to be intact" --
20 on Page 5, you didn't put numbers on your report so I
21 numbered them myself. It's Page 5.

22 A. Okay.

23 Q. "His memory appears to be intact."

24 And then the next sentence is, "At times his
25 recall of events in his medical history were inconsistent

1 with what was contained in the record."

2 Doesn't that mean his memory is not intact,
3 Doctor?

4 A. No. He's explaining why there were
5 inconsistencies, because I asked him about these
6 inconsistencies. And he said, well, sometimes the doctors
7 don't write down what he means. That's just his reason.

8 I don't put opinions in here, I just write down
9 what my observations and what his responses are under the --

10 Q. well, you did put your opinion in there because
11 you said his memory appears intact, isn't that your opinion?

12 A. That was my observation.

13 Q. Your observation?

14 A. Right.

15 Q. So you're aware -- again, just to go back for a
16 second, as I think we established before, I think you
17 answered my question, that you're really relying on
18 personality disorders in your determination of what's going
19 on with Mr. Tabler; is that fair to say?

20 A. I'm aware that that's his primary diagnosis and I
21 was determining whether he had instability in his mood or
22 his thinking that would -- that in turn affects his
23 capacity, and that was the chain of -- that was the chain of
24 mental conditions that I was looking at.

25 Q. So you didn't bother looking at his low IQ. I

1 think we already established that, right, because you said
2 he's average even though he's not. You didn't look at that,
3 correct?

4 A. well, I saw that in the psychological test results
5 that he had mixed results.

6 Q. well he had an 80 IQ?

7 A. On one test, yes.

8 And so when I was talking with him he didn't
9 appear to be dull like that and so that's why I asked him
10 what was going on with the psychological test and he
11 explained it to me.

12 Q. Is it your methodology, Doctor, to decide whether
13 somebody is intellectually disabled based on a conversation
14 rather than testing?

15 A. That's why I put his intellectual functioning
16 appeared to be average.

17 THE COURT: It appears this would be an
18 appropriate place to stop and take a lunch break.

19 We're going to take a one-hour lunch break. It's
20 about 12:15 now, so we will break until 1:15 and then we'll
21 be in recess.

22 (Whereupon, a recess was then taken at
23 12:17.)

24 THE COURT: Mr. Nolan.

25 MR. NOLAN: Good afternoon, Your Honor.

1 Q. (By Mr. Nolan) Dr. Arambula, I'm almost finished,
2 a couple more areas very quickly.

3 A. Okay.

4 Q. Now, I would like to have you take a look at
5 Plaintiff's Exhibit -- Petitioner's Exhibit 72 that's been
6 premarked.

7 And, again, this is part of the records that
8 you've seen but we just parsed them out so we're not having
9 piles and piles of paper everywhere.

10 A. Okay.

11 Q. I hope -- oop, I gave you the wrong one, sorry.

12 Now, Doctor, this is a document from October 18th,
13 2017, that is after Exhibit 51 that was written to the Court
14 in which Mr. Tabler said he wanted to waive his rights to
15 appeal.

16 And in this document, Mr. Tabler files a grievance
17 with the Texas Department of Criminal Justice and he says,
18 "Grieving that they were refusing to allow me to release my
19 property to my lawyers. This in direct violation of my
20 rights as an inmate that has been handed down a sentence of
21 death. Everything in my cell here on death row can and will
22 be used by my legal counsel as mitigating evidence --

23 (whereupon, the reporter asked for a
24 clarification.)

25 Q. (By Mr. Nolan) ... "will be used by my legal

1 counsel as mitigating evidence to help save my life from
2 execution."

3 Do you see that towards the top there?

4 Doctor, do you see that?

5 A. Oh, I thought you were talking to her.

6 Q. No, I'm sorry.

7 A. Yes, I see that.

8 Q. And do you see the last sentence that says,
9 "Anything that I wish to release to my lawyers through the
10 property room at a legal visit therefore becomes legal
11 material that will be used to save my life."

12 Do you see that?

13 A. I do.

14 Q. So in this document Mr. Tabler is talking about
15 still trying to save his own life even though at this time
16 he is engaged in an active waiver with the court, which you
17 have found to be -- him to be competent to make.

18 Does this have any impact on your opinion in terms
19 of this flip-flopping and all of those things that he's been
20 going through all of these years?

21 A. When I read this in my record review, it -- the
22 way I perceived it was that Mr. Tabler was trying to create
23 or present a stance on your behalf that the information that
24 he had was private between you and -- between he and his
25 lawyers who were trying to save his life.

1 I didn't look at the -- at this correspondence
2 that he was trying to, in other words, retract his waiver,
3 his right to waive his appeal but rather I looked at it as
4 evidence that the guard should not violate the privacy
5 between you and him, and that's how I looked at it.

6 Q. You didn't ask him about this document?

7 A. I did not specifically ask him about this one.

8 Q. So you have no idea whether he was trying to
9 retract his waiver or had those things in his head at the
10 time that he wrote this, do you?

11 A. All I could -- all I could ask him was about his
12 waivers, why did they wax and wane; in other words, why did
13 he take it back, why did he support it, what were his
14 thoughts and feelings. And, more importantly, was there
15 mental condition or disorder that substantially affected his
16 capacity in waiving his rights to -- in other words, waiving
17 his -- waiving his right to appeal. And that's how I looked
18 at this. So, I looked at it as information that co-existed
19 and not necessarily that this detracted from what he
20 reported to me in our face-to-face discussion.

21 Q. Now, in your reports -- strike that.

22 As we've been discussing this morning, you're
23 relying primarily on what you call his primary diagnosis of
24 personality disorders; is that correct?

25 A. That was the primary diagnosis.

1 Q. But you are aware that he's also been diagnosed
2 with Klinefelter's and fetal alcohol spectrum disorder,
3 correct?

4 A. Yes.

5 Q. And did you consider those at all?

6 A. I did, yes.

7 Q. Well, you almost say nothing about them in your
8 entire report so I'm trying to figure out how you considered
9 those in -- in your report on Page 7, which is the second
10 page from the end. You start off saying about
11 Klinefelter's, "Records show that Mr. Tabler had
12 Klinefelter's syndrome even though he did not know of the
13 chromosomal existence."

14 Do you see that?

15 A. I do.

16 Q. What did you mean by he had Klinefelter's
17 syndrome? Isn't it a genetic disorder?

18 A. It is. So, in other words, he had it since he was
19 born, basically.

20 Q. But he still has it now, right?

21 A. Yes.

22 Q. So you didn't mean that he had Klinefelter's
23 syndrome before but he doesn't have it anymore --

24 A. No.

25 Q. I guess that was confusing to me.

1 A. I guess I should have put has had, that might have
2 clarified it for you.

3 Q. Thank you.

4 This is a chronic condition, correct?

5 A. Life long.

6 Q. Life long, right.

7 And it happens from the time of birth; isn't that
8 correct?

9 A. Yes.

10 Q. You don't develop them later.

11 So, you read -- strike that.

12 You're aware of, Doctor, are you not, that people
13 with Klinefelter's disease have six times more -- or are six
14 times more likely to develop ADHD, are you aware of that?

15 A. Some people can, yes. I saw that in the report.

16 Q. And are you also aware that people with
17 Klinefelter's disease are four times more likely to develop
18 bipolar disorder, correct?

19 A. I saw that in the report, I believe.

20 Q. Do you know anything about Klinefelter's disease
21 on your own?

22 A. I've seen it during my training.

23 Q. During your training?

24 A. Yes.

25 Q. And since the time you've been involved in this

1 case did you do any research about it?

2 A. I wanted to see what its impact was on cognitive
3 functioning so I did a quick refresher. I think I looked at
4 one of my neuropsychiatry texts. I think that's about it.

5 Q. But -- so you are aware that it has an impact on
6 cognitive functioning, correct?

7 A. It can. It doesn't always.

8 Generally the cognitive functioning is relatively
9 intact but it really just depends on the individual and the
10 expression of the genes.

11 Q. Are you saying his cognitive functioning is
12 relatively intact?

13 A. No, I was talking about Klinefelter's.

14 In other words, some disorders generally bring
15 cognitive dysfunction and some others do not, it just
16 depends. And so I was referring to Klinefelter's
17 individuals in general.

18 Q. But in this specific case he does have these
19 cognitive disorders that are typically caused by
20 Klinefelter's; isn't that fair to say?

21 A. They can be.

22 He also has ADHD and his personality pathology, as
23 severe as it is, can also adversely affect
24 neuropsychological test results. So, it wasn't solely due
25 to Klinefelter's, it may have, but I didn't look at it as

1 the primary driving force between -- that was behind his
2 cognitive deficits.

3 Q. Well you said in your report, I believe, that you
4 were unable to determine what effect, if any, Klinefelter's
5 had on him. Is that what your determination is?

6 A. Above and beyond the effect that ADHD and
7 personality pathology had on his test results and his
8 academic performance, that's correct.

9 Q. Did you read Dr. Sprouse's report?

10 A. I did.

11 Q. So, now, typically in your field, Doctor, in
12 forensics you rely on other experts who have more
13 specialties -- more specialization in areas than you do; is
14 that fair to say?

15 A. That's true.

16 Q. So when you read Dr. Sprouse's report, that doctor
17 has more specialty in this field than you do; is that fair
18 to say?

19 A. By her description, that's fair to say. That's
20 what it looked like.

21 Q. And in reading Dr. Sprouse's reports, Dr. Sprouse
22 was able to determine how Klinefelter's adversely affected
23 Mr. Tabler; isn't that correct?

24 A. There was some mention of it. What I generally
25 recall about her report was it was pretty -- a very good

1 description of how Klinefelter's existed in the population
2 and so I really had to look for how it specifically affected
3 Mr. Tabler.

4 Q. Right.

5 And basically Klinefelter, in her report,
6 indicates this, it talks about predisposition for risk of
7 various things, correct?

8 A. That was one of the areas her report covered.

9 Q. Right. And in fact the predisposition of the risk
10 for those areas are things like neurodevelopmental,
11 neurocognitive, language delays, speech delays, metabolic
12 disorders, neuroanatomical abnormalities, anxiety disorders,
13 panic disorders, ADHD, dysfunction in behavior and emotion
14 regulation and executive dysfunction. Aren't those the
15 things that Dr. Sprouse talks about that these are the risks
16 for?

17 A. That can exist in individuals who have
18 Klinefelter's.

19 Q. And here you certainly have ADHD? You agree with
20 that, correct?

21 A. Yes.

22 Q. You had pre--- pre-diagnosed anxiety disorders
23 here, correct?

24 A. What does that mean, pre-diagnosed anxiety?

25 Q. You have anxiety disorders diagnosed in this case,

1 correct, that you've seen?

2 A. I have seen the diagnoses of anxiety disorder of
3 NOS, for example.

4 Q. Yes.

5 Now, you also reviewed Dr. Davies' report?

6 A. Yes, sir.

7 Q. For the record that's Exhibit 26.

8 A. In the binder it's 26.

9 Q. You don't necessarily have to look at them, I just
10 want to ask questions about them.

11 A. Okay.

12 Q. Now, in Dr. Davies' report, -- Dr. Davies is a
13 neuropsychologist, correct? Is that right, Doctor?

14 A. I don't recall. I have on one of these reports
15 that she's a physician, but that may have been a typo.

16 Q. She is -- I'm sorry, she's a Ph.D. I'm sorry.

17 A. Ph.D.

18 Q. Yes. I'm sorry.

19 Now, in -- I'm wrong.

20 Just so we're clear on the record, Dr. Davies is
21 an M.D., you are correct.

22 A. She's a pediatrician, right?

23 Q. Correct.

24 A. Okay.

25 Q. So, in Dr. Davies' report, she recounts what

1 Richard talked to her about. He says quote, on Page 12, "I
2 have a fucked-up spot in my brain that blows everything out
3 of proportion. I know there's something wrong with me, I
4 just can't put my finger on it."

5 In your review of materials regarding what
6 Klinefelter's is, is that something that could be consistent
7 with the existence of a genetic disorder that he knew
8 nothing about until recently?

9 A. Remotely possible as under -- per my analysis.
10 It's still, possibly a factor. But the overriding one was
11 that, unfortunately, his upbringing and lack of structure
12 that led to the development of some -- that contributed to
13 his personality pathology and then he had ADHD.

14 Q. So with all of the risk factors involving
15 Klinefelter's, which is a genetic disease from birth, you're
16 saying that that probably had nothing to do with any of his
17 problems?

18 A. No, I'm saying that it could have but it didn't
19 stick out and negate the other factors which were more
20 likely and causally related to his poor upbringing -- no
21 offense to his home life -- and that's the predominant cause
22 of personality pathology.

23 Q. Well, and also fetal alcohol spectrum disorder is
24 also something from birth, right? It's something that
25 doesn't change. It's a static condition. Isn't that fair

1 to say?

2 A. Yes.

3 Q. And Dr. Davies diagnosed him with alcohol-related
4 neurodevelopmental disorder, also fetal alcohol spectrum
5 disorder; is that correct?

6 A. Right.

7 Q. And in that determination, did you have a look
8 at --

9 MR. NOLAN: I'm sorry, may I have a moment, Your
10 Honor?

11 Q. (By Mr. Nolan) If you look at Page 5 of
12 Dr. Davies' report, which is Exhibit 26.

13 A. Do I have that?

14 Q. It's in the binders, yeah.

15 well, let me say this first, do you agree that
16 Mr. Tabler has fetal alcohol spectrum disorder?

17 A. What I -- what I obtained from the history was
18 that his mother drank during pregnancy.

19 Some of the other features of fetal alcohol -- or
20 fetal disorder/fetal alcohol spectrum disorder, like some of
21 the facial -- unusual facial changes, growth changes, that
22 was not evidenced in his history.

23 And as I understand fetal alcohol disorder and the
24 spectrum disorder, the cognitive dysfunction tends to be
25 more global to where there's the presence of intellectual

1 disability and not patchiness.

2 I mean, anything's possible but that's how I
3 generally recognize this. And so once again I didn't see
4 that fetal alcohol rose above and beyond the presence of his
5 severe personality pathology, which had a lot do with his
6 academic performance in addition to the presence of ADHD.

7 Q. But they can co-exist, correct?

8 A. Yes.

9 Q. And in this situation do you find that they do
10 co-exist or they don't?

11 A. I think it could be a contributing factor, but
12 again, it was not anything that I could see that set it
13 apart from his core features of personality pathology and
14 ADHD.

15 Q. You're aware that fetal alcohol syndrome
16 disorder -- we're not saying fetal alcohol -- we're saying
17 fetal alcohol spectrum disorder is what he has, not fetal
18 alcohol syndrome, there's a difference, right?

19 A. Right, because he doesn't meet the other features
20 for fetal alcohol disorder. That's correct.

21 Q. So you're aware that a small head circumference at
22 birth is one of the indicators of fetal alcohol spectrum
23 disorder; is that correct?

24 A. That could be, sure.

25 Q. And in Exhibit 26, Dr. Davies' report, you'll see

1 on Page 5 the indication that birth head circumference 24
2 versus 29 centimeters handwritten, zero percentile, so he is
3 less than one percent in the numbers of head circumference.

4 Isn't that a very strong indication of this -- of
5 him having fetal alcohol spectrum disorder, Doctor?

6 A. I think that's possible, like I said. But I was
7 not able to ascertain how it stood out in the forefront
8 compared to the rest of his pathology. It's possible.

9 But the changes in growth and development that
10 didn't follow him and because he didn't meet criteria for
11 fetal alcohol disorder, which has a set number of criteria,
12 that meant that it was -- that whatever occurred -- no
13 offense to Mr. Tabler -- did not have such a significant
14 influence on him and so the next level over would be fetal
15 alcohol spectrum disorder which means it's not as prominent.

16 Q. But it still has an impact on someone's
17 development, it has an impact on their neurocognitive
18 development, doesn't it?

19 A. It could and --

20 Q. It can and, in fact, it did in his case, right?

21 A. Well, I was expecting a more global impairment as
22 I'm familiar with fetal-alcohol children and I saw, instead
23 of patchiness, he was really tall which negated the fetal
24 alcohol disorder kids, the spectrum disorder that even some
25 of the adults I've come across in the criminal justice

1 system.

2 So it could have, but I was not able to ascertain
3 how and when it stood at the forefront in comparison to his
4 core feature of personality pathology and the ADHD which
5 emerged during his youth.

6 Q. So you know that people with Klinefelter's
7 syndrome are tall, right?

8 A. Yes.

9 Q. Kind of skinny and lanky?

10 A. Yes.

11 Q. So you're discounting fetal alcohol spectrum
12 disorder because he's tall but you won't acknowledge that
13 Klinefelter's syndrome had any impact on him either; is that
14 correct?

15 A. That -- so either one could have but neither stood
16 out in the forefront compared to his core features of
17 personality pathology and the ADHD which emerged during his
18 youth.

19 MR. NOLAN: Can I have one moment, Your Honor?

20 THE COURT: Sure.

21 MR. NOLAN: Your Honor, I have no other questions
22 at this time.

23 THE COURT: Ms. Patton, do you have any questions?

24 MS. PATTON: No, Your Honor.

25 THE COURT: Okay.

1 Dr. Arambula I do have a couple of follow-up areas
2 that I would like to address in light of your testimony in
3 response to Mr. Nolan's questioning.

4 =====
EXAMINATION
5 =====

6 BY THE COURT:

7 Q. I think, for my purposes, I take Mr. Nolan's line
8 of argument to imply that someone with the constellation of
9 psychological issues, problems, history that the petitioner
10 in this case has, that someone with that profile, by virtue
11 of that profile, is rendered sort of in a de facto sense
12 incapable of exercising competent judgment in making
13 important decisions.

14 So I want you to address that for me, and that is
15 if you posit most if not all of the things that Mr. Tabler's
16 lawyers are describing with regard to his history and his
17 deficits, that notwithstanding that, are individuals still
18 able to exercise in a particular moment proper judgment and
19 informed judgment to make important decisions in their
20 lives?

21 Do you get the gist of my question?

22 A. Yes, I believe so.

23 So, let me address the different areas, the
24 different conditions that he has. with regards to
25 Klinefelter's, what I recall from my training, is that the

1 cognitive dysfunction could be there or it could not be
2 there. It really just depends. Generally individuals just
3 don't have problems cognitively but that doesn't mean it's
4 across all -- everyone.

5 So, it's -- it's there. Okay? I can't refute it.
6 It is there. I don't want to refute it.

7 when I saw him initially and I had seen the record
8 it was like, Oh, he has Klinefelter's, but I already knew
9 that. Okay?

10 with regard to fetal alcohol children, remember
11 fetal alcohol disorder has more significant -- it's more
12 substantial in its presence than the fetal alcohol spectrum
13 disorder. That means that -- spectrum disorder means that
14 some of the symptoms might be there but some are missing and
15 so, the presence of that injury is not as substantial as it
16 could be with fetal alcohol.

17 with fetal alcohol children, disorders, children,
18 their cognitive dysfunction tends to be more global because
19 of the alcohol effects on the growing brain. So what I
20 didn't see in Mr. Tabler's neuro-psych testing was a global
21 decline. It was patchy. In some areas I didn't expect him
22 to do so well and he did great and some areas he didn't do
23 so great.

24 And, so, I looked at those and it depends on how
25 severe the cognitive dysfunction is, which is the bottom

1 line, and that ultimately could affect decision making to a
2 substantial degree or maybe significant but not substantial.
3 It just depends on the individual.

4 Now, let me add that ADHD affects cognitive
5 dysfunction, persistence, flexibility, making harsh
6 decisions, those kind of things, attention span. And
7 personality pathology, particularly when it's more serious
8 like borderline personality, for example, that can adversely
9 affect neuro-psych test results.

10 So I have -- Klinefelter's wouldn't explain how
11 wild he was -- and I'm using his own words. No offense to
12 Mr. Tabler -- when he was growing up. Fetal alcohol might
13 but given where he came from, the lack of supervision, the
14 neglect that was there -- I'm not criticizing I'm just
15 looking at this factually.

16 He didn't have a lot of structure growing up, so
17 when he went outside of his home, he didn't have that
18 structure and that internalization to take with him into --
19 into -- into public, and so he behaved recklessly. He
20 didn't have good control of his emotions and when he was
21 angry and upset, he was way out of control.

22 And so, that course of being so volatile and at
23 times very antisocial is what was front and center stage as
24 opposed to Klinefelter's and fetal alcohol spectrum which
25 could be there but it was more those two.

1 And so, again, to answer your question, it depends
2 on the individual. I would expect fetal alcohol disorder to
3 maybe be more significant in its impact on cognitive
4 function and decision making but it depends on the case.

5 Fetal alcohol spectrum disorder, it could be, but
6 maybe not so much, but again, depends on the case.
7 Klinefelter's I wouldn't expect it to, but, again, it
8 depends on the case.

9 Q. Does that hold true with the remainder of his --
10 the existing diagnoses that he has with regard to
11 psychological behavioral issues?

12 And that question -- does that question pertain in
13 that someone could have those diagnoses, have that history,
14 and would having those diagnoses categorically prevent them
15 from being, at a particular time, prevent them from
16 exercising sufficient judgment to be competent and to make
17 important decisions in their lives? And let --

18 A. So, first of all, it would be unlikely to but in
19 Mr. Tabler's circumstance, because he has serious borderline
20 pathology and his emotions can be out of control -- let's
21 say that he has some cognitive impairment associated with
22 fetal alcohol spectrum disorder and his emotions are way out
23 of control. His emotions are already going to affect his
24 thinking and then that's going to overcome the limits of his
25 cognitive deficits due to fetal alcohol spectrum disorder,

1 so it's not by itself, it's the two hand in hand.

2 Like I said, I -- I'm not going to say that fetal
3 alcohol spectrum disorder does not exist, I couldn't
4 determine how it stood out compared to any of the others.
5 But his personality pathology -- and I'm not the only one,
6 he's seen thirty or forty doctors, at least. Personality
7 pathology is in everything and that's the issue that I
8 looked at and tried to assess how it waxed and waned and
9 when it deteriorated, how did that affect his decision
10 making.

11 The last few years he's been pretty stable and he
12 told me that before that when he initially wanted to waive
13 his appeals, he was still up and down, and I believe that's
14 why you got these back and forth dissemblance.

15 But I was looking at it more contemporaneously and
16 I didn't find a mental condition or disease that
17 substantially affected his capacity.

18 Q. So following up on that, in reviewing previous
19 opportunities he's had to address his desire to waive his
20 appeals, I've read very carefully the record and I've had
21 now two opportunities to visit with him face -- well, one
22 opportunity face to face, one on the phone where he was
23 consistent and explicit about his wishes.

24 And from a layperson's perspective, not a mental
25 health professional, he appears to me to be convincing that

1 he knows what he's doing, that he has the sufficient
2 capacity to reflect on the consequences, that he has
3 reflected on the consequences. He's articulate in relating
4 over time that he understands why other people wouldn't make
5 that choice for him but has articulated what I consider to
6 be rational reasons for making that decision.

7 Is there anything, in listening to that and in
8 reading those records, that as a nonmental health
9 professional I'm missing? In other words, he sounds to me
10 like he knows what he's doing. Sitting here as a
11 psychiatrist and having had the opportunity to look at his
12 record and to visit with him in a clinical context, is there
13 the possibility that I would be missing anything in my lay
14 assessment of what I have just observed?

15 A. Essentially, no. But I will have an asterisk. It
16 depends on what he's like at the time because his
17 personality can go up and down. He could be pretty stable
18 and then very unstable in five minutes. And so overall he
19 would be unstable. But when somebody is pretty stable over
20 a prolonged period of time that infers that the severity of
21 their overall personality pathology has -- it has dissipated
22 to some degree.

23 He still has it. It's not going to ever go away
24 but has it risen to the level where he can't control his
25 mood, his mood affects his thinking, sometimes he hears

1 voices, which he has in the past, he's paranoid, which he
2 has in the past, that's what I'm looking for in affecting
3 his knowledge and his understanding and appreciation of the
4 circumstances and the choices that he's making.

5 THE COURT: Okay, thank you very much.

6 Mr. Nolan, any follow-up?

7 MR. NOLAN: No, Your Honor.

8 THE COURT: Okay, thank you.

9 Any further questions of this witness from anyone?

10 May this witness be excused?

11 MR. NOLAN: That's fine.

12 MS. PATTON: No objection, Your Honor.

13 THE COURT: Dr. Arambula, thank you very much.

14 All right, Mr. Nolan, do you have any witnesses
15 that you would like to present?

16 MR. NOLAN: We do, Your Honor.

17 First, I would like to move in some exhibits that
18 I moved to introduce by Dr. Arambula. 65, 66, 67, 68, 69,
19 70, 71 and 72.

20 (Whereupon, Petitioner's Exhibit Nos.
21 65-72 was offered.)

22 THE COURT: Any objection, Ms. Patton?

23 MS. PATTON: None for the purposes of this
24 hearing.

25 THE COURT: without objection, and with such

1 limitation, those are admitted.

2 (Whereupon, Petitioner's Exhibit No.
3 65-72 was received in evidence.)

4 MR. NOLAN: Thank you, Your Honor.

5 We'll call Dr. Richard Dudley to the stand.

6 THE COURT: Dr. Dudley, if you would come forward,
7 sir.

8 Good afternoon, sir. Would you please raise your
9 right hand to be sworn.

10 RICHARD G. DUDLEY,
11 was called as a witness and, having been first duly sworn,
12 testified as follows:

13 THE WITNESS: Yes.

14 THE COURT: Please be seated.

15 =====
16 DIRECT EXAMINATION
=====

17 BY MR. NOLAN:

18 Q. Good afternoon, Dr. Dudley.

19 A. Good afternoon.

20 Q. What's your profession?

21 A. I'm a physician with a specialty in psychiatry.

22 Q. And do you do forensic work?

23 A. Yes, I do.

24 Q. I would ask to show what's been premarked
25 Exhibit 73, which is Dr. Dudley's CV.

1 Dr. Dudley, is that a recent copy of your
2 curriculum vitae?

3 A. Yes.

4 Q. And is it accurate?

5 A. Yes.

6 MR. NOLAN: Your Honor, I guess I would ask to
7 move that in. I can go through qualifications if you would
8 like with Dr. Dudley just a little.

9 (Whereupon, Petitioner's Exhibit No. 73
10 was offered.)

11 THE COURT: I reviewed his qualifications and
12 unless, Ms. Patton, you have any objection --

13 MS. PATTON: No, Your Honor, we have no objection.

14 THE COURT: I'll take judicial notice of all of
15 this. Thank you.

16 (Whereupon, Petitioner's Exhibit No. 73
17 was received in evidence.)

18 MR. NOLAN: Thank you, Judge.

19 Q. (By Mr. Nolan) Now, Dr. Dudley, you were retained
20 in this case by whom?

21 A. By your office.

22 Q. Okay. And what were you asked to do?

23 A. I was asked to perform an evaluation of
24 Mr. Tabler.

25 Q. And did you do a clinical interview with

1 Mr. Tabler?

2 A. I did a clinical interview. I reviewed numerous
3 records and documents, information gathered from others who
4 had known him, so a range of information including the
5 clinical interview.

6 Q. And, did you -- so you reviewed collateral data?

7 A. Yes, I did.

8 Q. And so when I ask you -- were there a couple of
9 items that you received since you did your report?

10 A. Yes, and I also saw them again since I did my
11 report.

12 Q. Let's go over the items first. Did you review the
13 report of Dr. Arambula?

14 A. Yes.

15 Q. And you just watched his testimony; is that
16 correct?

17 A. Yes, I did.

18 Q. Did you also review the report of Dr. Curry that
19 you had not previously had?

20 A. That's correct.

21 Q. And when did you see Mr. Tabler again?

22 A. In -- can I check?

23 Q. Yeah, yeah. I'm sorry.

24 A. In April of 2017.

25 Q. And the first time you saw him was back in 2015?

1 A. That's correct.

2 Q. And your report -- your report is dated
3 September 4th, 2015?

4 A. That's correct.

5 MR. NOLAN: All right. And, for the record,
6 that's Exhibit 23 in our composite exhibit list, Your Honor.

7 THE COURT: Thank you.

8 Q. (By Mr. Nolan) So I'm going to ask you about your
9 opinions. Can I just ask that all opinions that you give be
10 to a reasonable degree of medical and psychiatric certainty?

11 A. Yes.

12 MR. NOLAN: Your Honor, based on the review of the
13 resumé and Dr. Dudley's qualifications we would ask that he
14 be accepted as an expert in psychiatry.

15 THE COURT: Okay, without objection?

16 MS. PATTON: No objection, Your Honor.

17 Q. (By Mr. Nolan) So, Dr. Dudley, when we first
18 retained you, we had asked you to do kind of a mental health
19 mitigation type workup and -- but did we also ask you to
20 comment on something else? And you can refer to Page 10 of
21 your report if you need to.

22 A. Yes.

23 Q. What else did we ask you to comment on?

24 A. Well, there had been the history of waiver and so
25 there was a question of were there mental-health issues that

1 were related to the issue of waiver and then retraction of
2 the waiver.

3 Q. Okay. And so in terms of competency, like pure
4 competency, it's clear you haven't seen Mr. Tabler since
5 April of 2017, so can you -- can you opine on his competency
6 today to execute a waiver of his appeals?

7 A. Well, the mental-health issues that were
8 identified, number one, are chronic in nature; and, number
9 two, seem to have been relevant when you look at the pattern
10 of the history.

11 And so that -- and also other information that was
12 available around the time of this most recent waiver would
13 add up to suggest that we're really looking at a
14 continuation of the same pattern that he exhibited in the
15 past.

16 Q. Can you assess whether --

17 THE COURT: I'm sorry, could I get you to clarify?
18 Could you re-ask that question.

19 MR. NOLAN: Re-ask the question?

20 THE COURT: Yes. I didn't get a clear answer.

21 Q. (By Mr. Nolan) Okay. So, Dr. Dudley, my question
22 was about competency in and of itself rather than
23 voluntariness, which we're heading towards.

24 In respect to competency in and of itself, can
25 you -- can you comment on whether or not he is competent

1 today in terms of his ability to waive his appellate rights
2 at this point?

3 A. I'm sorry, so what I thought I said was that it --
4 whatever -- the conditions that he has are chronic
5 conditions that he's always had so I don't see any change
6 with regard to the issue of, you know, with regard to his
7 competency in the past versus today. That seems to be
8 consistent.

9 THE COURT: Well, hold on. He's been found to be
10 competent before.

11 THE WITNESS: Correct.

12 THE COURT: So you say, yes, he is.

13 THE WITNESS: I don't see any change.

14 THE COURT: So the answer is yes?

15 THE WITNESS: Yes.

16 THE COURT: Okay. Great.

17 MR. NOLAN: I'm sorry.

18 THE COURT: Not at all.

19 Q. (By Mr. Nolan) So let's switch gears and talk
20 about voluntariness.

21 So, you've seen him several times and reviewed a
22 lot of documents. There are some diagnoses that we're going
23 to go into briefly in a moment, but can you make an
24 assessment about whether or not the combination of the
25 disorders that you have found in Mr. Tabler impact his

1 capacity to voluntarily make a voluntary decision to waive
2 his appeals?

3 A. Yes.

4 Q. And what's your opinion?

5 A. My opinion is that it's the issue of the
6 voluntariness that is affected by his psychiatric disorders.

7 Q. So let's talk a little bit about the disorders
8 that you found. Let's start with Klinefelter's, if we
9 could. Can you just briefly describe what Klinefelter's is?

10 A. Klinefelter's is a chromosomal abnormality. It's
11 a 2XY chromosomal abnormality that carries with it, as
12 you've already discussed, the risk of a variety of
13 psychiatric and neuropsychiatric difficulties.

14 what I think is most -- most impressive as it
15 relates to Mr. Tabler is the -- not only the risk of the
16 neuro-cognitive difficulties but the kind of anxiety that
17 is -- tends to be associated with the disorder and the --
18 compared to the level of anxiety that he has described as
19 existing since he was a child. That is really not
20 explainable by his other characterological, other
21 psychiatric difficulties.

22 Q. Is there a significance regarding Klinefelter's to
23 not being treated for it?

24 A. The significance -- well, two things -- I mean, it
25 doesn't go away; and then if you're not being treated for it

1 then over time you have the appearance of these other
2 psychiatric and neuropsychiatric difficulties. So, in other
3 words, the earlier you would have intervened the more likely
4 you are to avoid having the development of these other
5 difficulties.

6 Q. So are you aware that Mr. Tabler asked in the
7 prison for treatment for Klinefelter's?

8 A. Yes, I am.

9 MR. NOLAN: I was going to ask that you review
10 this so I can move it into the record. This is Exhibit 74.

11 (Whereupon, Petitioner's Exhibit No. 74
12 was offered.)

13 THE COURT: Thank you.

14 Any objection? Any objection to 74, Ms. Patton?

15 MS. PATTON: No, Your Honor. I'm sorry.

16 THE COURT: Not at all. Without objection, so
17 admitted for the purposes of this hearing.

18 (Whereupon, Petitioner's Exhibit No. 74
19 was received in evidence.)

20 Q. (By Mr. Nolan) So, Dr. Dudley, you see that that
21 is a request from Mr. Tabler dated 8-3-2017?

22 A. Yes.

23 Q. Requesting treatment for Klinefelter's?

24 A. Yes.

25 Q. And the prison states usually people that are

1 prepubescent are treated. Once adulthood is reached, there
2 is no treatment. Is that accurate?

3 A. No.

4 Q. Are you also aware that this was one month before
5 he sent a letter to the court to waive his appeals?

6 A. Yes.

7 Q. Is there a significance of that in any -- in your
8 mind at all?

9 A. Well, only that it's part of what was going on
10 with him at the time.

11 Q. Now, there's been discussion about borderline
12 personality disorder and I think you have found that
13 Mr. Tabler has borderline personality disorder. Would you
14 agree with that?

15 A. Yes.

16 Q. What is the impact of borderline personality
17 disorder on his capacity to voluntarily -- make a voluntary
18 decision to waive his appeals?

19 A. Well, the disorder is characterized by instability
20 in multiple important kind of areas of functioning, and so
21 one of those is the person's capacity to attach and connect
22 with people, so there's instability there. They have a very
23 rapid, all-consuming attachment with somebody who is
24 wonderful and idealizable, and then sometimes they'll run
25 away from a relationship because of fear of loss of a

1 relationship, so this kind of instability in relationships
2 is a hallmark of borderline personality disorder.

3 Similarly there's instability around one's own
4 sense of self, self-worth, of self-value, so that people may
5 range one moment from seeming very kind of narcissistic and
6 grandiose to the next moment they're feeling empty and
7 worthless.

8 There's instability with regard to mood, and so
9 the ability to regulate one's mood or the mood reactivity --
10 that intense mood reactivity to situations they find
11 themselves in, all of this contributes to this kind of
12 instability and difficulty regulating mood.

13 And then, in the -- there's also impulsivity with
14 regard to kind of decision making, not thinking things
15 through, acting impulsively. And of course under stress
16 people with borderline personality disorder can have other
17 difficulties. They can have kind of transient psychotic
18 episodes. They can have dissociative episodes. But that
19 broad-base instability in those multiple important areas of
20 functioning is the hallmark of this personality disorder.

21 Q. Okay. So you heard Dr. Arambula. His testimony
22 was -- he was really focusing pretty heavily on personality
23 disorders to the exclusion of other things. So I would like
24 you to talk about some of the other things that are in this
25 case, other things that you have found.

1 And, you know, on your report, in your report you
2 talk about some of these things. You talk about impaired
3 executive functioning as one of these other things. Talk
4 about how that fits into this constellation of things.

5 A. well, while it's true that people with severe
6 personality disorders, you know, that severe personality
7 disorder can have an impact on neuro-psych testing. But the
8 level of cognitive and intellectual impairment that the
9 testing revealed here is not that. That's not the kind of
10 thing that we see simply based on the personality disorder.
11 So clearly there's something else that resulted in such --
12 such significant difficulties as evidenced by the
13 neuro-psych test.

14 And so there -- in this case, you know, kind of
15 multiple things that can contribute to that, one, we know
16 that these neuro-cognitive difficulties are associated with
17 fetal alcohol spectrum disorder. We know they're associated
18 with Klinefelter's. We also know that he has a history of
19 head injuries. So, you know, any one of those or a
20 combination of those factors are more likely explanations
21 for the kind of level of difficulties that were revealed
22 through neuro-psych testing which are substantial.

23 The -- so the issue is that that becomes another
24 factor, and I think what's most compelling is the -- how
25 compromised his ability to problem solve and work things

1 through really are, as -- you know, as a result of these
2 neuropsychological difficulties.

3 Q. Okay. And when you take those neuropsychological
4 difficulties in combination with the borderline and the mood
5 disorders that you've diagnosed, you know, what -- what
6 happens when -- when someone like Mr. Tabler is overwhelmed
7 by circumstances?

8 A. Well, I think, you know, what happens is what you
9 heard today, right, that I think when you -- when you look
10 back over the pattern it's not -- what jumps at you is not
11 suicidality that is related to these periodic decisions to
12 waive. What jumps out at you is being overwhelmed by what
13 he's feeling, whether it's anxiety, whether it's fear,
14 whether it's loss, whether it's another sense of abandonment
15 or whatever that grows out of these -- this combination of
16 psychiatric or neuro-psychiatric problems juxtaposed against
17 the situation that he finds himself in.

18 And this sense of being overwhelmed by it, feeling
19 like you're going to explode, feeling like you're going to
20 act out; and then the response is, How do I get myself out
21 of this.

22 Q. Okay. So, you started to talk about this a few
23 minutes ago and I asked that very inartful question a couple
24 minutes ago. But you talked about the chronic nature of his
25 disorders and difficulties. Can you talk a little bit about

1 that in some specifics like . . .

2 A. well, the -- the -- the impact of -- he's born
3 with two disorders, right, the Klinefelter's syndrome and
4 the fetal alcohol spectrum disorder, and neither one of
5 those go away. And so their impact on his ability to
6 function is persistent. They're not episodic disorders.
7 They have kind of a constant impact on his ability to
8 function so they're at play all the time.

9 Then we have the characterological, the borderline
10 personality disorder that developed, you know, by definition
11 a personality disorder is a kind of a fixed way of
12 functioning, so that's set. It's always operative, it's
13 always there. The -- and it's impacting on him all the
14 time.

15 One thing we haven't mentioned yet is that there's
16 a very significant trauma history here where he was
17 repeatedly exposed to violent traumatic experiences in the
18 absence of any sort of parental assistance and managing
19 those traumas. We know that kids have a certain amount of
20 resiliency, but, you know, such repeated exposure to trauma
21 would be difficult to not be affected by and certainly
22 impossible to manage in the absence of parental assistance
23 and managing traumatic events.

24 In other words, kids aren't born with the capacity
25 to know how to manage that sort of stuff, it's -- it's that

1 parents intervene, help calm them down, help protect them,
2 help make them think things are going to be okay. Through
3 that process they eventually learn.

4 In the absence of that, then the -- the response
5 to being frightened, the response to being in those sort of
6 violent traumatic experiences becomes the child's persistent
7 response, so they become hypervigilant, they become worried
8 that things are going to happen to them, they overreact to
9 things that are threatening to them, they never learn to
10 calm themselves down.

11 so that's -- that's in play as well.

12 And so, the point I'm trying to make is that he
13 has a variety of difficulties that impact on his cognitive
14 and intellectual capacities. He has a variety of things
15 that cause him to be more anxious, more hyper, more fearful.
16 And then he has these things like the characterological
17 difficulties that were discussed earlier that make him
18 particularly vulnerable to certain sorts of psychosocial
19 stressors.

20 And you put him in an environment that is
21 basically defined by the types of psychosocial stressors
22 that he's most vulnerable to, the -- the losses, the
23 attachment issues, the -- you know, watching, you know, your
24 friends die, you know, or, you know, and those sorts of
25 things which he's particularly vulnerable to; the isolation,

1 you know, being left alone, not having contact.

2 And the -- he describes, as he's described today,
3 that those sorts of things are overwhelming to him and that
4 he can't take it and when he can't take it there's a variety
5 of things that he's done over the course of his life to try
6 to calm that down.

7 Q. So when you -- when you say today you're talking
8 about when Mr. Tabler was speaking?

9 A. Yeah, during the colloquy.

10 Q. And so, how does he -- how does Mr. Tabler deal
11 with these situations where these constellation of disorders
12 interacting with his situation make him overwhelmed? How
13 does he deal with that?

14 A. I mean, historically he's dealt with it in a
15 variety of ways, certainly one way is to escape, you know,
16 to get out of here. And the -- and he describes different
17 things that he's done over time in a manner that's
18 consistent with that, so say when he was younger and was
19 doing a lot of the cutting behavior, the cutting behavior
20 was not really so much about suicide at all, it was about
21 that was a way to release a lot of this.

22 And he talks about how, you know, when he would
23 cut himself, just seeing himself bleed, feeling it was a way
24 of calming himself down from otherwise feeling so
25 overwhelmed.

1 And I think when you look at this pattern as it
2 relates to the waivers it's the same sort of thing, I can't
3 take this, I'm going to explode, I'm going to do something.
4 How do I extricate myself from this? And under this current
5 circumstances, you know, this is his option to waiver out.

6 Q. So, in other words, you're saying that when he
7 gets overwhelmed and he takes those things with the
8 constellation of disorders, one of the ways he deals with
9 this is by waiving his rights?

10 A. Correct.

11 Q. Now, you heard Dr. Arambula say that Mr. Tabler
12 doesn't have symptomatology of his personality disorder so
13 he's not -- so he's -- so he -- and he's not acting out on
14 his threats and things like that. Did you hear that
15 testimony this morning?

16 A. Yes, I did.

17 Q. And did you agree with that testimony?

18 A. No.

19 Q. Why not?

20 A. Well, I mean I think there's a couple of things.
21 One is that I don't -- I don't feel that there's a history
22 that his acting out is defined by a suicide attempt which
23 would seem to be running through the thread of the
24 presentation this morning, that when he's -- that his
25 waivers or his difficulties are related to when he's

1 suicidal and he's self-destructive in that sort of way.

2 That's not what I saw as a pattern of behavior.

3 What I saw was the pattern of behavior is that I'm
4 going to explode in some sort of way when I can't take it
5 anymore, and then if he finds some way to calm himself down,
6 if he finds some way -- you know, whether it was through
7 cutting or whatever -- if he finds some way to retreat and
8 escape from that, he's going to be okay.

9 But there's a fear that he -- he always -- he
10 carries this fear that he describes very clearly that he
11 won't be able to do that and that he would explode.

12 The -- the -- what I attempted to describe is that
13 the waiver puts an end to it, and that's the -- you know,
14 that's the ultimate escape from the conditions that he's
15 facing.

16 Q. So, you've reviewed a lot of records and things
17 that are up on the table there. Is there a -- is there a
18 psychiatric significance to you regarding Mr. Tabler's kind
19 of flip flopping, going back and forth roughly ten times,
20 waiving and taking it back, waiving and taking it back?

21 A. The -- the significance is I think that -- let's
22 see if I can explain this.

23 The -- the characterological difficulties, for
24 example, are part of what makes him particularly vulnerable
25 to his circumstance. So, say for example this most recent

1 time, the -- I don't think it's at all surprising that this
2 waiver has come after the execution of somebody who he was
3 particularly close to. The kind of instant real intense
4 connection with someone is very characteristic of the
5 characterological difficulties that really both of us have
6 been talking about all day.

7 The -- in this case, there was a reciprocal
8 attachment, you know, that was going on. I mean, he was
9 getting -- this other inmate who was executed was somebody
10 who was responsive and obviously had an attachment to him as
11 well.

12 When I met with him in April, which was a matter
13 of a couple of months before the execution, he was already
14 talking about how difficult this execution was going to be
15 for him, he even compared it to all the other people that he
16 had seen executed while he's being housed there in the
17 death-watch area. So, it was even anticipating that this
18 was going to be a particularly difficult time for him.

19 The -- and so this is in the context of somebody
20 who suffers from discharacterological difficulty in the
21 context of someone who has been historically isolative and
22 abandoned and rejected in the context of being housed in
23 virtual isolation with these kind of limited access to
24 relationships, not having been able to see his family for
25 all of these years and then you have this loss provokes,

1 because of this constellation of difficulties that he has of
2 this particular vulnerability in this particular setting,
3 really is overwhelming difficulties for him that just become
4 unbearable.

5 Q. So let's talk about the situation with his family
6 and you're aware of that, that he hasn't seen his mother in
7 eleven years and you heard him say that in court today.

8 Can you comment from a psychiatric perspective on
9 what you watched today when Richard was talking to the Court
10 about that, about his mother?

11 A. Well, I think that -- I mean, number one, you
12 know, again in the context of the psychiatric difficulties
13 that we're talking about, and in the context of that history
14 of their relatedness that was alluded to, you know, by -- in
15 the earlier testimony in the context of listening to him
16 describe when I saw him, the sense of abandonment and how
17 devastated he was when his mother left and wouldn't take him
18 with her and pushed him away.

19 The -- so, in the context of all of that, you
20 know, what you heard -- what we heard today was kind of the
21 classic as it relates to the characterological difficulties
22 that we were describing, you know, that to -- you know, in
23 this sort of environment, challenge her to make this
24 decision for me, stand up in court, tell me that you know I
25 shouldn't go through with this, which is kind of, you know,

1 proving that you really do care about me is just a classic
2 example of what we're talking about and it's that level of
3 difficulty that becomes so overwhelming to him.

4 Q. Now, so, Dr. Dudley, when you consider the
5 combination of these disorders -- we've been using the word
6 constellation -- and you combine these with the conditions
7 of confinement and the repeated loss and the lack of family
8 contact, do you have an opinion about whether, while under
9 these conditions, Mr. Tabler is capable of making a
10 voluntary decision to forego his appeals?

11 A. Yes, I do.

12 Q. And what is your opinion?

13 A. That he is not.

14 Q. And why is that?

15 A. It's my opinion that the -- that his ability to
16 manage his anxiety, to manage his mood, to really in some
17 real way that we think of as adult consideration of
18 consequences is, under ordinary circumstances, difficult for
19 him to do. Under the current -- under the conditions that
20 he finds himself in now, which obviously would be enormously
21 stressful for anybody, that that just intensifies all of the
22 underlying difficulties that he has.

23 And that -- that many of those conditions actually
24 feed into and exacerbate the difficulties that he has and
25 that -- that anxiety, that depressive reaction, that sense

1 of loss, I mean all of those feelings that become so
2 overwhelming to him are such that they really drive his
3 decisions.

4 Q. Okay.

5 MR. NOLAN: May I have one moment, Judge?

6 THE COURT: Yes.

7 Q. (By Mr. Nolan) Dr. Dudley, one thing I did
8 forget.

9 You heard Dr. Arambula this morning was talking
10 about some diagnoses of NOS, not otherwise specified. Can
11 you explain what that means?

12 A. The DSM, all of them but including this most
13 recent one, the 5th one, divides the psychiatric disorders
14 into broad categories so, for example, anxiety disorders or
15 psychotic disorders. And under each of those broad
16 categories are the specific recognized disorders. And then
17 at the end of there, there's a category that -- so say under
18 psychotic disorders you'll have delusional disorders,
19 schizophrenia, the different specific disorders, then there
20 will be psychotic disorder not otherwise specified.

21 what that means is that it allows for a variety of
22 things. It allows for a typical presentation where -- which
23 we know exist with all of the psychiatric disorders, it
24 allows for the fact that you don't quite have enough
25 information, you know, to select one of the specific

1 psychiatric disorders, it allows for a situation where
2 you're seeing, you know, because they're the same category,
3 someone who has symptoms of more than one disorder within
4 that same category.

5 So, it means -- "not otherwise specified" means
6 it's not -- it's a psychotic disorder but not one of the
7 specific ones that are listed like schizophrenia or
8 delusional disorder. It could be for any of those reasons.
9 One is that you're in the process of your evaluation, you
10 know there's enough -- that it's a psychotic disorder but
11 you need some more information to decide which one it is, or
12 it's an atypical presentation or the person has symptoms of
13 more than one in that category, it can be mean a variety of
14 things that the NOS, not otherwise specified, stands for.

15 Q. But does that mean that the disorder doesn't
16 exist?

17 A. No, and it doesn't mean that the person isn't
18 impaired, doesn't mean that the person isn't suffering.
19 The -- I mean, when -- when you think about what are the
20 diagnostic criteria, you know, the diagnostic criteria are a
21 combination of things. The diagnostic criteria include
22 symptoms, you know, you have to have this particular
23 symptom, you have to hear a voice, you have to do this, it
24 includes time criteria, you know, you have to have it for
25 this long of a period of time or it has to occur in recurring

1 episodes.

2 It may include sub -- this can't be due to a
3 substance, it can't be due to some other sort of medical
4 condition, so in the process of doing an evaluation, for
5 example, you may say we need some more information to
6 determine whether this is substance induced or not, or we
7 need to have some period of time when the person isn't on
8 substances to see whether the symptoms go away to determine
9 whether it's substance induced or not.

10 So during that period of time you're using the NOS
11 because you don't know whether you want to put it in the
12 category of substance induced or not substance induced until
13 you resolve that, so that's an example of what you might use
14 NOS for.

15 It's not a statement about the person has less
16 symptoms or has less suffering occurring, it's that you're
17 trying to make sure that you've fully assessed for all the
18 diagnostic criteria before you pin it down to this specific
19 disorder.

20 MR. NOLAN: Okay, thank you.

21 THE WITNESS: Is that --

22 MR. NOLAN: Yeah, thank you, that was good.

23 That's all we have, Your Honor.

24 THE COURT: Thank you.

25 Any questions?

1 MS. PATTON: No questions, Your Honor.

2 THE COURT: Dr. Dudley.

3 =====
4 EXAMINATION
5 =====

6 BY THE COURT:

7 Q. So by way of background, before I ask questions,
8 let me just say that there were many things in your report
9 that were helpful and interesting to me and so now that I'm
10 going to launch into some challenging questions, I don't
11 want to leave unsaid that there were things that were very
12 helpful in your report, but let me ask you these things.

13 First of all, did anything -- did you learn
14 anything from the time you delivered this report to today
15 that significantly changed your opinion on any of the
16 matters we've been discussing today?

17 A. I mean, I didn't learn anything that changed my
18 opinion.

19 Q. Okay.

20 A. Some things happened that helped to confirm my
21 opinion but not to change it.

22 Q. Okay. Okay. So, you understand that the question
23 before me today with regard to Mr. Tabler's current request
24 is to determine whether or not he is making a knowing and
25 voluntary waiver of the proceedings that are pending in my
court. You understand that?

1 A. I understand that.

2 Q. And you understand that that's a binary question,
3 right? It's a yes or no?

4 A. Yes.

5 Q. And what I kept looking for in your report was a
6 yes-or-no answer because you indicate in your report that
7 you were asked to render an opinion as to whether or not
8 he -- whether or not he -- you believed his waiver was
9 knowing and voluntary, and until -- today was the first time
10 that I actually heard you render an opinion.

11 Can you point to anyplace in your opinion --
12 excuse me -- in your report where you deliver that opinion?

13 A. Well, at the time that I wrote the report there
14 wasn't a request for a waiver. I was asked to comment on
15 the issues that contribute to that. Subsequent to writing
16 my report then there was a waiver and so I -- I -- in my
17 report I wasn't really talking about -- there wasn't a
18 waiver on the table but I was talking about the kinds of
19 issues that I felt had come up historically that needed to
20 be considered when considering this issue.

21 Q. So this was -- sorry, go ahead.

22 A. So the waiver came subsequently -- actually the
23 waiver came subsequent to that.

24 Q. So this was more of a general psychiatric
25 evaluation?

1 A. Right.

2 Q. So, then, what's remarkable to me about that is
3 that every time you discuss -- sort of the language is that
4 he has impairments that directly relate to an ability to
5 plead and waive rights.

6 A. Correct.

7 Q. So you do talk about waiver there, substantially
8 impair his ability to understand the decisions he's faced
9 with.

10 Those sorts of -- the use of that sort of
11 language, the issues that undermine his capacity to make a
12 knowing, intelligent and voluntary decision and when he
13 announced his desire to give up his state habeas litigation
14 so there you were talking about past waivers.

15 So every time you talk about your doubts as to
16 whether or not he possesses the capacity or the
17 complications with it or the ways that it's been
18 compromised, you're also talking about whether or not he has
19 capacity, right? I mean, every time I see it, it's both
20 capacity and whether it's voluntary and you seem to concede
21 today that you -- your opinion about capacity is that he
22 does have capacity but your opinion about voluntariness
23 is -- goes the other direction.

24 Can you sort of flesh out why the difference in --
25 since every time you talk about them and express your doubts

1 and all the reasons that you give seem to apply to both, so
2 I'm wondering where's the divergence and why you're now
3 satisfied that it's knowing and not voluntary?

4 A. I think there's two things and I'm not sure if
5 I've made one of them clear.

6 And that is that, what I was trying to say there
7 is that he has -- that he has more than one psychiatric and
8 neuro-psychiatric difficulty and that each of them have
9 their direct effect on his ability to function. And then,
10 they -- they also impact on each other there by exacerbating
11 each other. So you have to -- so that's kind of issue
12 number one.

13 Then issue number two, it's in that context that
14 he experiences whatever he experiences, right. And so, when
15 I -- when I saw him the second time there was almost an
16 anticipation of the fact that he was about to have more
17 difficulties, as he's talking about an anticipated loss.

18 Then -- and talking about the relationship that's
19 involved and even in the process of talking about that,
20 seeing how that was so consistent with the psychopathology
21 that had been evidenced before, that here's a situation that
22 was really feeding right into the psycho -- the
23 characterological difficulties that were described this
24 morning, that those were coming -- about to come into play
25 here.

1 And, so -- so it's the intersection of these
2 difficulties interacting with each other, exacerbating each
3 other and how then whatever he's experiencing is experienced
4 in that -- in the context of these difficulties that I'm
5 trying to understand whenever I talk about it with him,
6 describe with him.

7 So as it stands now, it's not my opinion that it
8 worsens his intellectual capacities, it's not my opinion
9 that it worsens his cognitive difficulties in any particular
10 way that would render him less cognitively intact than he is
11 ordinarily. I don't see that as happening whatsoever.

12 What I see is that the circumstances that he's in
13 now exacerbates the underlying psychiatric difficulties that
14 causes him so much anxiety, so much distress, such an
15 overwhelming sense of loss, so much anger that it
16 exacerbates those feelings and that they become the driving
17 force for a decision.

18 Now, the compromised intellectual and cognitive
19 difficulties that exist, of course, you know, the -- the
20 impulsivity in making decisions, the difficulty that he has
21 in really considering what the full range of options might
22 be, does he have the capacity to hold those, does he have
23 the kind of working memory required to hold those in his
24 head while he weighs the pros and cons.

25 That stuff is not worse, but the fact that it's

1 not great, you know, increases the risk that these -- I'm
2 afraid to use emotions, that's not what I mean, but that's
3 kind of -- the pain that he's feeling is going to have an
4 impact on it because of the impairment that exists within
5 his decision making but it's not the decision making -- it's
6 not the decision-making capacity has deteriorated.

7 Q. So when was the last time that you had the
8 opportunity to interview or examine Mr. Tabler?

9 A. Last year, April -- before -- April.

10 Q. So a year and a few months?

11 A. Right.

12 Q. Do you think your opinion about his perception of
13 his current circumstances have had the potential to change
14 between now and then? I mean, in other words, you get the
15 gist of my question?

16 A. I think it definitely has changed. I think the
17 point I was trying to make is that when I saw him in April
18 he was anticipating a major event which he was anticipating
19 was going to have a major impact on him. The major event
20 happened, when he waives he writes about the major event and
21 it's impact on him.

22 There's other information that was made available
23 to me in the sense of his talking about that so I think
24 that -- I think that that has changed. I mean there's lots
25 of evidence that has changed since I saw him in April and

1 there's a lot of fixation on that series of events.

2 Q. And there you're referring to the execution of his
3 friend?

4 A. Right.

5 Q. So following up on that, to the extent that that
6 might have been a motivating factor for his desire to waive,
7 at some point if he maintains that desire, doesn't that
8 suggest that rather than being a temporary and impulsive
9 reasoning that it might be a more substantial and durable
10 reasoning for wanting to -- in other words, it's not a --
11 it's not a completely irrational reason it's just that we
12 want to make sure that it's not impulsive, right?

13 And he doesn't -- the fact that he has maintained
14 that, as you know, that he still talks about that but he
15 hasn't changed his mind about wanting to waive more than a
16 year later, does that factor into your --

17 A. What factors into my thinking about it is, is
18 that -- is that it really raises a series of issues. I
19 mean, I don't think it's as quite as -- let me put it this
20 way.

21 Let's look at simply the issue of bereavement,
22 right, which in my view is only a sub piece of this, that
23 you expect somebody to grieve a loss and then to move on,
24 right? His -- his instability around attachment and
25 therefore the significance of these unusually important

1 relationships for him and what they mean for him and what
2 they say about him is such that it sets him up for this much
3 more complicated bereavement as opposed to a normal grief
4 period, he gets over it and moves on.

5 So I think it's -- I think what's better -- this
6 is better conceptualized is what we in psychiatry would call
7 a more complicated bereavement which gets extended, it
8 becomes really a much more complicated situation than that.

9 The -- and raises other sorts of issues for him
10 than a simple loss of somebody who he cared about. So I
11 think it's much more complicated than that.

12 The -- and he had some actual insight into this
13 when I saw him back in April because he's -- you know, we
14 talked about the fact that he had seen many -- the many
15 people who he had met on the death watch obviously had been
16 executed and this stood out for him as something that was
17 going to be very different and very significantly different
18 for him.

19 And I think the communication that he's had about
20 it subsequently speaks to this much more complicated
21 bereavement as opposed to a resolution of the normal
22 bereavement and now a rational decision.

23 Q. Okay.

24 Another angle that I'm sort of viewing this from
25 is it might elicit -- it might not elicit different

1 responses would be what in your view could change either
2 things that we've been talking about from a psychiatric
3 perspective, from an environmental perspective, what could
4 change that you believe would satisfy you that he could
5 regain a position of making a voluntary decision in this
6 matter?

7 A. Um --

8 Q. If anything.

9 A. I mean, I think the conditions of his confinement
10 are an enormous issue. The -- that's number one. Number
11 two, the absence of the type of support that is significant
12 for him or I guess to put it in response to your question,
13 the availability of support that would be significant to him
14 would make enormous difference.

15 I mean, the -- the challenge to his mother to
16 offer another option for him, you know, to say don't do this
17 is in part a part of the psychiatric difficulties but it's
18 in part a cry for that sort of support that would make a
19 difference, so I would say the availability of that level of
20 meaningful psychosocial support and a change in the
21 conditions of his confinement.

22 THE COURT: Thank you very much. Any further
23 questions?

24 MR. NOLAN: Just one follow up.

25 THE COURT: Please, yes.

=====

REDIRECT EXAMINATION

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BY MR. NOLAN:

Q. Dr. Dudley, the Court was asking about the execution of Mr. Tabler's friend last July. Have you also seen documents that -- in which Mr. Tabler has written about the number, the sheer number of people that he has gotten close to that have been executed?

A. Yes.

Q. Does that impact you or your opinion at all?

A. Yes. I mean, I think it impacts my opinion in two ways, one as kind of a backdrop and one as part of a kind of definition of the conditions under which he is confined. But I think it's important to -- in my view it's important to recognize the -- the significance of that particular relationship against the -- when compared to the other people who he's seen executed over the years.

I mean, I was -- as I indicated, when I saw him in April of 2017 I was struck by that, I mean particularly given the fact that on a regular basis he meets people, knows them for a period of time and they are executed. So I was struck by how different this was for him and then he put it in those terms, this is not like all the other ones.

The -- the more I learned about it, you know, from seeing other pieces of information, the more I recognized

1 that as having part to do with the reality of it and having
2 part to do with his psychiatric difficulties in the sense of
3 the significance that it had.

4 So part of that was the reality of it and part of
5 the significance was the psychiatric difficulties.

6 MR. NOLAN: Thank you, that's all I have. I'm
7 sorry, could I --

8 THE COURT: Sure, sure, sure.

9 MR. NOLAN: That's all, Your Honor.

10 THE COURT: I have another question, if you don't
11 mind, while I have you here and this is a bit beyond your
12 expertise but it's because I think you have an interesting
13 perspective on a lot of these issues.

14 It would probably not be surprising that many, if
15 not most, inhabitants of death row would exhibit or have
16 exhibited psychiatric history and difficulty. They
17 certainly all find themselves in difficult conditions of
18 confinement. It leaves us with the problem of exhibiting a
19 significant degree of paternalism on that basis to deprive
20 them of the opportunity to make decisions that are the most
21 decisions -- among the most important decisions they've
22 made.

23 And it would probably -- it probably is a
24 universal problem if you phrase it that way, if you frame it
25 that way.

1 And my difficulty is, Mr. Tabler presents himself
2 as having a significant degree of agency, he seems to know
3 what he's doing and what's going on and he responds
4 appropriately to my questions, and what am I missing that
5 would lead you to have me deprive him of what we would give
6 most people and that is the ability to determine their
7 preferences with regard to representation or not?

8 THE WITNESS: I'm hearing -- and maybe incorrectly
9 but I'm hearing a couple of questions.

10 One is most -- about most people on death row.
11 Most of my work in capital litigation has been post
12 conviction. I mean, I've done trials but most of it has
13 been post conviction so I've seen a lot of people on death
14 row. I've seen a lot of people on death row here in Texas.
15 The -- and so I've seen a lot of people who know people who
16 have been executed.

17 The -- to give you an example of what I'm talking
18 about, the room at the prison where we do psychiatric
19 evaluations is next to the room where people do their last
20 visits with family before they're executed. And so that,
21 you know, I've seen lots of people on the death row in
22 Texas. If I happen to be there on a day before an execution
23 and I'm with someone on death row next door to the person
24 with their family and kids having their -- there's something
25 that happens that is dramatically different than my normal

1 visits.

2 So the -- that level of awareness of execution is
3 very different than simply being on death row, right? And I
4 would say that Mr. Tabler's placement on the death-watch
5 unit is even more severe than that and that that's
6 substantially different than being on death row.

7 The other question I heard you asking is, you
8 know, kind of -- I would say, I would urge you to listen
9 carefully to this notion that I can't take it anymore.
10 Because that's what I'm trying to describe. I'm trying to
11 describe what I've heard from him over and over again that
12 needs to be clear in the records in a variety of ways.

13 That he becomes so overwhelmed by affect and
14 response to whatever situation that he's found himself in
15 that he can't cope with that he will do anything to
16 extricate himself from it, and that's what I think you're
17 seeing now.

18 THE COURT: Thank you very much.

19 Any follow-up?

20 MR. NOLAN: No, sir.

21 THE COURT: Okay, thank you very much.

22 May this witness be excused?

23 MR. NOLAN: Yes.

24 THE COURT: Thank you very much, Dr. Dudley.

25 Next witness?

1 MR. NOLAN: We would call Dr. Dan Martell.

2 THE COURT: Good afternoon. If you can raise your
3 right hand to be sworn, please.

4 DANIEL A. MARTELL,
5 was called as a witness and, having been first duly sworn,
6 testified as follows:

7 THE WITNESS: I do.

8 THE COURT: Thank you. Please be seated.

9 =====
10 DIRECT EXAMINATION
=====

11 BY MR. NOLAN:

12 Q. Good afternoon, Doctor.

13 A. Good afternoon.

14 Q. What's your current position -- current employment
15 position?

16 A. I'm a forensic neuropsychologist. I'm
17 self-employed. I work in a -- predominantly in a group
18 practice called Park Beach and Associates in Newport Beach,
19 California.

20 Q. And how long have you been doing forensic work?

21 A. Close to thirty years.

22 Q. And have you worked capital cases previously?

23 A. Many times.

24 Q. And have you worked both for the prosecution and
25 the defense?

1 A. Yes, I have.

2 Q. In the Atkins case, which is the seminal
3 disability case, who employed you in that case?

4 A. I was the state expert, the Commonwealth of
5 Virginia's expert.

6 Q. Have you previously been accepted as an expert in
7 forensic neuropsychology?

8 A. Yes.

9 MR. NOLAN: I would ask to pass up Dr. Martell's
10 resumé.

11 (Whereupon, Petitioner's Exhibit No. 75
12 was offered.)

13 Q. (By Mr. Nolan) Dr. Martell --

14 THE COURT: I think we have two 74's here.

15 MR. NOLAN: Oh, shoot.

16 THE COURT: 74 is Correctional Managed Care clinic
17 notes.

18 MR. NOLAN: Yes.

19 Make this 75. My apologies.

20 THE COURT: Okay.

21 THE COURT: Any objection to the admission of
22 Dr. Martell's CV?

23 MS. PATTON: No, Your Honor.

24 THE COURT: So admitted.

25 (Whereupon, Petitioner's Exhibit No. 75

1 was received in evidence.)

2 Q. (By Mr. Nolan) Let me ask that again.

3 Dr. Martell, is that a recent copy of your CV?

4 A. Yes, it is.

5 Q. Is that accurate?

6 A. It is.

7 MR. NOLAN: Your Honor, we would ask that
8 Dr. Martell be accepted as an expert in neuropsychology.

9 THE COURT: Any objection?

10 MS. PATTON: No objection.

11 THE COURT: Without objection I will do so.

12 Q. (By Mr. Nolan) Dr. Martell, did you -- strike
13 that.

14 I'm going to ask that your opinions that you offer
15 today be offered to a reasonable degree of scientific and
16 neuropsychological certainty.

17 A. Yes.

18 Q. Can you just quickly -- we're going to go through
19 this as quickly as we can, but just very briefly just
20 explain the difference between clinical psychology and
21 neuropsychology for the Court?

22 A. Neuropsychology is a subspecialty of clinical
23 psychology that deals with brain damage and its effect on
24 human behavior so we do everything that clinical
25 psychologists do and then we have additional training and

1 experience in people with brain impairment.

2 Q. Okay. So now in this case who were you retained
3 by?

4 A. Your office.

5 Q. And what were you asked to do?

6 A. I was asked to do a neuropsychological evaluation
7 of Mr. Tabler and to describe his strengths and weaknesses.

8 Q. Were you asked to assess his competency at any
9 point?

10 A. I was not.

11 Q. Were you provided with background materials?

12 A. I was.

13 MR. NOLAN: Can I have a moment, Your Honor?

14 THE COURT: Sure.

15 Q. (By Mr. Nolan) Dr. Martell, if you would look at
16 Exhibit 27 in the binder.

17 A. I have it.

18 Q. Is that a copy of your report in this case?

19 A. Yes.

20 Q. And you can see on the second page there's a
21 section called materials reviewed?

22 A. I see that.

23 Q. And does that accurately reflect the materials
24 that you were provided and reviewed?

25 A. It does. There's more detail, I think there's an

1 appendix at the end of my report starting on Page 16 that
2 lays out every single thing I looked at but I tried to
3 summarize them in a paragraph there.

4 Q. That's fine.

5 Since you issued your report, did you also receive
6 the report of Dr. Arambula?

7 A. I did.

8 Q. And did you also receive the report of Dr. Curry
9 that you had not previously had?

10 A. Doctor whom?

11 Q. Dr. Curry, Keith Curry?

12 A. Yes, I did.

13 Q. Now, did you also conduct a clinical interview in
14 this case?

15 A. I did.

16 Q. And when was that?

17 A. That was, I believe, July 6th of 2015.

18 Q. And did you conduct neuropsychological testing
19 during that clinical interview?

20 A. Yes, I did.

21 Q. During that -- after that interview, did you make
22 a specific recommendation to myself and the other lawyers on
23 the case based on your evaluation of Mr. Tabler?

24 A. I did.

25 Q. What was that?

1 A. I observed some physical abnormalities about him
2 that suggested to me that he could have Klinefelter's
3 syndrome and so I discussed that with your office, and I
4 think they subsequently had the genetic testing done that
5 showed that to be the case.

6 Q. So, your suspicion turned out to be true?

7 A. Yes, it did.

8 Q. What is Klinefelter's syndrome?

9 A. As Dr. Dudley explained, it's a chromosomal
10 abnormality, you're born with an extra X chromosome. It
11 generates abnormal height and lankiness, underdevelopment of
12 male sex organs, so there's a loss of testosterone, which is
13 generally the way the disease is treated in prepubescent
14 children to try to make up for that.

15 But it also brings with it, especially when it
16 goes untreated, a variety of increased risks for psychiatric
17 disorders, specifically schizophrenia and bipolar disorder.
18 The risk for bipolar goes up about four times in people with
19 Klinefelter's syndrome. It also increases your risk for
20 attention deficit hyperactivity disorder by six times and we
21 know from history that Mr. Tabler has that, actually has
22 both bipolar disorder and ADHD in his history, so I think
23 those are well explained by his genetic disease.

24 And I guess the final thing is that it creates
25 neuro-cognitive impairment, there's a specific

1 neuropsychological signature that we see by which I mean a
2 pattern of strengths and weaknesses that we see in people
3 with Klinefelter's syndrome and he has that pattern.

4 It had previously been unrecognized but once you
5 know the key, that he's got this genetic abnormality,
6 suddenly everything falls in place because his presentation
7 is textbook classic.

8 Q. So you did neuropsychological testing -- and I'm
9 going to come back to that in a second, but were the results
10 of your neuropsychological testing consistent or
11 inconsistent with what you would expect for someone with
12 Klinefelter's?

13 A. They were exactly consistent with what you would
14 expect. There was problems in two broad areas -- actually
15 in three. In addition to his attention deficit
16 hyperactivity disorder which is caused by Klinefelter's,
17 there's evidence in the neuro-psychneuro-psych testing of
18 attention deficits. There's evidence in the neuro-psych
19 testing of learning disabilities, which is another finding.
20 There evidence in the neuro-psych testing that his verbal
21 intellectual abilities are less well developed than his
22 nonverbal abilities, and this is a classic pattern in
23 Klinefelter's syndrome.

24 And finally there's evidence of what we call a
25 dysexecutive syndrome, problems in frontal lobe functioning.

1 In people with his profile it affects sort of verbally
2 mediated frontal lobe skills, things like problem solving,
3 impulse control, judgment, reasoning, and the ability to
4 sort of foresee future consequences of one's behavior or to
5 adapt your behavior to changing problem situations.

6 Q. Okay. So, I just want to back up for a second.

7 In the materials that you reviewed, did you
8 review -- did you become aware that there was prior
9 neuropsychological testing of Mr. Tabler?

10 A. Yes.

11 Q. So, the first was Dr.~Milam, M-I-L-A-M; is that
12 accurate?

13 A. Yes.

14 Q. And how did your review of Dr.~Milam's testing
15 relate to your own results?

16 A. It's essentially the same pattern. He had seen
17 him I think two years before I did -- no, pardon me, several
18 years, 2008. Actually, no, there's three
19 neuro-psychologists that have seen him. The first was
20 Dr.~Milam or Milam in 2006, December of 2006. The second
21 was Dr.~Harrison in June of 2008, and then there was me, in
22 June of 2015.

23 what's striking about all three is that they all
24 got basically the same result, they got this Klinefelter's
25 signature profile.

1 Q. And is that signature profile, again is that
2 consistent with the Klinefelter's syndrome?

3 A. It's completely consistent with it, it is the
4 exact profile you would anticipate and knowing that he has
5 that diagnosis now makes those data make perfect sense.

6 Q. Was there also at one point an EEG that was
7 administered to Mr. Tabler?

8 A. I think there was. I'm looking to see if I have
9 it here in my report. I think there was an EEG and I think
10 there was a CAT scan but I don't have notes of that in my
11 report.

12 Q. Okay. We'll just move on. That's fine.

13 So can you just describe briefly the testing that
14 you did and the results that you got from your testing?

15 A. Well, the first thing I wanted to do -- in any
16 kind of forensic case you're concerned about malingering or
17 faking, so I gave an assortment of tests, some are embedded
18 in other tests like the IQ testing. There's ways to look at
19 that to look at effort and then there's free-standing tests
20 that just look at people who are trying to fool me, and I
21 sprinkled those throughout the whole day of testing with him
22 in order to measure his effort over time.

23 He was valid on every one of them except the very
24 last one at the end of the day when he petered out and kind
25 of lost enthusiasm. It's a lot of testing. I spent five or

1 six hours with him, and by the end of the day he was over it
2 and it showed up there. But everything else we did was
3 valid and effortful.

4 So overall I think the battery is interpretable
5 and the fact that the findings are consistent with the prior
6 testings lends what I call convergent validity. They all
7 agree that. They all show the same pattern.

8 Q. Are you also aware of whether Dr. Milam and
9 Dr. Harrison also did validity testing in their batteries?

10 A. They did, and he was valid and effortful for them
11 as well. It's standard practice to do this.

12 Q. So, in terms of the results of your testing, and I
13 guess since it's convergent with the others, what are the
14 findings in terms of his cognitive abilities?

15 A. Well, as I noted before he's got problems with
16 attention, are consistent with his history of attention
17 deficit disorder. He had problems with expressive language
18 so specifically if you show him a picture of an escalator he
19 would have difficulty finding the word for that. We call
20 this an expressive aphasia which is a 25-cent word for
21 problems finding words that you want.

22 He had learning disabilities in all areas, worse
23 for math but below grade level. He's got a 10th grade
24 education, he was around the 8th grade level or below for
25 reading or spelling and reading comprehension. He had

1 difficulties in this executive frontal lobe functioning.

2 The frontal lobes are the biggest part of the brain that
3 help us control and direct our behavior, that tell us when
4 to inhibit impulses and when not to, they are the seat of
5 judgment in human beings.

6 He has impairments there that are specific to
7 being cognitively flexible. He is not, he is very rigid.
8 Difficulty paying attention to more than one thing at once,
9 multitasking, divided attention, he doesn't do well with
10 that. And he had great difficulty in adapting to changing
11 problem situations.

12 And he also showed two hallmark behaviors, one is
13 called perseveration where it's a pathological repetition;
14 for example, on a test of his ability to recall a list of
15 words, a memory test, he would repeat words he had already
16 said without realizing it and do that over and over.

17 He also did something called confabulation which
18 is to make up things that weren't in the test, not
19 intentionally but unknowingly add items to the list that
20 were never presented to him. So these are hallmark signs of
21 frontal lobe impairment and the ability to monitor your
22 behavior and control your impulses, to blurt out a word that
23 you've already said for example.

24 So that's sort of the universe of things. There
25 were also deficits in visual perceptual organization and

1 both auditory and immediate memory. So, generally it's
2 things having to do with language that he has the greatest
3 problem with, so verbal learning, language skills, and then
4 the attention deficits, the learning disabilities and the
5 executive cognitive deficits. And that's the Klinefelter's
6 signature.

7 Q. Okay, and so you had said before the frontal lobe
8 is consistent with what can be expected for somebody with
9 Klinefelter's syndrome?

10 A. Yes, it's precisely the kind of impairments. I
11 think there was testimony this morning that -- I forget the
12 term that was used. That it was spotty or inconsistent. He
13 can do some executive things well and others not as well.

14 So we all have strengths and weaknesses, but he
15 had global diminishment in his IQ, coming in at 80, and then
16 in the frontal lobe domain he had the signature that's
17 specific to people with this verbal learning problems that
18 he has in Klinefelter's.

19 Q. So taking a combination of those things, you
20 talked about impulse control already but what type of impact
21 does that have on judgment?

22 A. Well, it undermines the cognitive resources
23 necessary to make critical decisions in life or in specific
24 situations. For example, some of these tests you may be
25 going along sorting cards to a certain strategy like things

1 that are red or circles or square. And then the test
2 administrator will change up what you need to look for and
3 you have to be able to adjust, use your judgment to figure
4 out what I'm looking for and adapt to the changing problem.

5 He was unable to do that, he would continue to
6 persevere and continue to sort to color even though the
7 task had changed and now the important thing was to go to
8 shape. He had difficulty making those kinds of shifts in
9 his capacity for judgment and seeing what's coming next.

10 Q. I think you talked about executive dysfunction a
11 bit. Did you read Dr.~Davies' report?

12 A. I did.

13 Q. And what is microcephaly?

14 A. It's a small brain, small head.

15 Q. And in terms of the fetal alcohol spectrum
16 disorder did you take that into consideration in your
17 overall evaluation?

18 A. Mr. Tabler's a gentleman with multiple problems.
19 I -- personally, every doctor seems to have what they think
20 is most salient today. To me it's Klinefelter's syndrome
21 but it doesn't exist in isolation, so he also has fetal
22 alcohol dysfunction, which contributes to his cognitive
23 impairment although he displays the classic signature for
24 Klinefelter's. Fetal alcohol certainly doesn't help him
25 function any better in that regard.

1 Q. And in your experience in doing forensic
2 neuropsychology for many years, have you dealt with
3 situations where you've had to deal with fetal alcohol
4 spectrum disorder?

5 A. Many times.

6 Q. And is there a correlation between that disorder
7 and cognitive impairment?

8 A. Quite often, and I think Dr. Arambula was correct
9 in describing sort of a global deterioration, and we do see
10 that in Mr. Tabler in terms of intellectual IQ. So IQ tests
11 test many different areas of cognitive functioning and he's
12 depressed across the board.

13 Although there is a disparity where his verbal
14 skills are even more impaired than his other skills, his
15 nonverbal problem solving skills. The whole thing is down,
16 but then there's a further differential in those two areas.

17 Q. Now at some point in your report you talked about
18 the command and control center. Can you just describe what
19 that is and how his impairment's impacted?

20 A. What I'm talking about there is frontal lobe and
21 this dysexecutive syndrome. The frontal lobes are the place
22 where our behavior is shaped and directed, where we reason,
23 where we make judgments and decide on a course of action.
24 He's impaired in those, in his frontal lobe. He has a
25 dysexecutive syndrome.

1 Q. So does that impact his ability to plan and
2 organize, things like that?

3 A. Yes.

4 Q. How about his ability to direct his behavior?

5 A. Yes.

6 Q. And to solve problems and to learn from mistakes?

7 A. That too.

8 Q. Okay.

9 And does frontal lobe impairment, can that have an
10 impact on his ability to make voluntary decisions?

11 A. That becomes a complicated question. And it
12 becomes very specific to Mr. Tabler in the circumstances
13 that we find ourselves in, that go to his conditions of
14 confinement. I think that any normal human would find the
15 conditions he lives under unbearable.

16 When you bring his combination of deficits into
17 that situation, the Klinefelter's problems, which all in and
18 of itself impact judgment and impulse control and reasoning,
19 the fetal alcohol, the neurocognitive deficits and then the
20 psychiatric impairments, the borderline personality disorder
21 and the affective disorder that he has, when you add all
22 that burden, all that psychiatric and neurocognitive and
23 genetic burden to someone and then put them into this
24 situation that any normal human being would find unbearable
25 you get this kind of response. It's utterly impossible for

1 him to bear.

2 He described that to me when I saw him in 2015.
3 He wasn't waiving rights at that time, but he described at
4 length how unbearable this was for him and how frustrated he
5 was, how frustrated he felt with being watched 24 hours a
6 day, with having his mail opened and read and scrutinized
7 and being -- he understood it as punishment for the cell
8 phone incident, but nonetheless, the sense of isolation,
9 particularly the inability to see his family, even at that
10 time he was complaining, made his life not worth living.

11 Q. So I think you indicated during the interview with
12 him that he described emotional ups and downs?

13 A. Yes.

14 Q. Now, you're aware that he has frequently changed
15 his mind in terms of waiving his rights and reinstituting
16 his rights?

17 A. Yes.

18 Q. Approximately ten times.

19 Is that consistent with the findings that you
20 found in terms of his neurocognitive disabilities,
21 Klinefelter's and those things?

22 A. Well, my formulation on this is, you know, he
23 brings all that into the room with him but at the end of the
24 day, you know, this is the only mechanism he has to try and
25 take some control over a situation that he finds himself in

1 that he can't stand.

2 And all he can do is say -- you know, when he was
3 younger he would say I don't like this, I'm going to cut
4 myself and then you get people's attention and they come and
5 deal with the problem that you're having. He can't cut
6 himself anymore so he says I'm going to waive my appeals and
7 have my execution go forward.

8 MR. TABLER: Excuse me, Judge.

9 THE COURT: Sure.

10 MR. TABLER: Sorry to interrupt. Actually I'm not
11 sorry, right. He says I don't have the ability to cut
12 myself, right. You're wrong. Any time over there on death
13 watch we're allowed to shave in the shower. We go to shower
14 Monday, Wednesday and Friday, any time I can break that
15 razor down and cut myself any time I want.

16 I haven't had a disciplinary case in TDC for
17 almost 3 years nor have I harmed myself in that time because
18 I choose not to.

19 THE COURT: Thank you, sir.

20 MR. TABLER: Go ahead.

21 Q. (By Mr. Nolan) Let's get back to the conditions
22 of confinement. You were talking about the isolation, can
23 you talk about the lack of privacy of the 24-hour camera and
24 the impact that would have on someone with his conditions?

25 A. Again, I go back to any human, myself, to have

1 someone watching you, have you on video 24 hours a day, year
2 in and year out for years and years, there's -- you know,
3 this country's kind of founded on the right to privacy and
4 that's just stripped away.

5 And I'm sure that would take a psychological toll
6 on anyone, much less someone with the impairments that he
7 brings into that room with him. So, you know, that's
8 certainly -- it's not necessarily the most disturbing thing
9 to him, but it's up there.

10 Q. When you heard about the evidence -- and I know
11 that you weren't able to -- you didn't talk to him about
12 this because it was afterwards, about the loss of a very
13 close friend of his but now that you've heard that part of
14 the evidence, what is your opinion about what impact that
15 would have on someone with the disorders that Mr. Tabler
16 suffers from?

17 A. Well, again, you know, being -- everyone on death
18 row gets to know each other and people are executed and that
19 impacts people, but not everyone has his situation where
20 he's put -- he's the only guy there or maybe there's a
21 couple of other guys with him that are awaiting their
22 execution.

23 Getting to know those people, especially someone
24 that may have been the best friend he ever had and then
25 watching them go one after another and knowing that some day

1 that's going to be you too, that has to create enormous
2 psychological damage to people. It's not a normal thing to
3 be put in that situation and watch one guy after another
4 that you get to know, even if it's over a period of weeks or
5 months before the execution is carried out, to have that
6 repetitive stress of getting to know those people and
7 watching them be executed, it's outside the realm of normal
8 human experience for any of us. And, again, much less for
9 someone with his disabilities.

10 Q. So just focusing specifically on cognitive
11 impairments, Klinefelter's, fetal alcohol spectrum disorder,
12 are these -- are these things that are chronic in nature or
13 can the symptoms of -- related to those things dissipate
14 over time?

15 A. They're chronic, the Klinefelter's there actually
16 is treatment for. That's another thing that's interesting
17 to me in the timing of this and of his motion to the court
18 to waive, is, you know, he finds out he's got this disorder,
19 he says I would like treatment for this disorder and he's
20 told there is no treatment for your disorder, which isn't
21 true.

22 And then his friend is executed and then the
23 waiver comes. I find that note that came back saying it's
24 too late, there's nothing that can be done to treat you, to
25 be significant in the total picture here because, you know,

1 he's asking, you know, okay, so maybe there's some reason
2 I'm the way I am, maybe there's treatment that will help me
3 not want to kill my guards or hurt other people and he's
4 told, no, there is none when there is treatment.

5 MR. NOLAN: For the record that's Exhibit 74 that
6 Dr. Martell's referring to.

7 Q. (By Mr. Nolan) So, Doctor, when you take the
8 conditions of confinement, the isolation, the 24-hour
9 cameras, the inability to see his family and put those
10 together with the psychiatric disorder, the cognitive
11 disorder, the Klinefelter's syndrome, the FASD, do you have
12 an opinion about whether Mr. Tabler, under his current
13 situation of conditions of confinement, is capable of making
14 a voluntary decision to forego his appeals?

15 A. I don't believe that he is. I think he -- this is
16 a gesture of defiance and desperation that's driven by his
17 conditions, both his psychiatric and genetic conditions and
18 the state conditions of confinement that is untenable for
19 him.

20 MR. NOLAN: Okay.

21 Thank you, Your Honor. We have nothing further.

22 THE COURT: Thank you.

23 Any questions?

24 MS. PATTON: No, Your Honor.

25 THE COURT: Thank you.

=====

CROSS-EXAMINATION

=====

BY THE COURT:

Q. Dr. Martell, I have questions of you that are along the same lines as I asked before, but a slightly different take. And some of them bear more on I should be asking a philosopher rather than a psychologist but because this is your area of expertise you've given an opinion.

So, you've described the conditions that Mr. Tabler is facing now on a day-to-day basis, and you said, anyone would find them unbearable?

A. Yes.

Q. The problem in this case is that if someone did not have the deficits that Mr. Tabler has the law would allow them an opportunity to make a decision to set into events -- set into action events that would ultimately alleviate that suffering and get them out of that condition and we would give them that opportunity.

And it's kind of a cruel irony that Mr. Tabler, according to you, the deficits that he suffers from have the additional disadvantage of having us take away from him that agency to make the decision that you and I would have and others that did not have the deficits that he has.

So, he's almost -- you know, he's being penalized by the very thing that got him in the situation. And so I

1 have to ask, you know, someone who presents himself in the
2 moment as giving reasonable responses to my questions,
3 giving justifications that we would accept from a person who
4 didn't have the diagnoses that you have made, yet, I'm to
5 disregard those responses that are the same responses that
6 someone would give if they did not have those diagnoses
7 because he is at an increased risk for those deficits
8 affecting his cognition.

9 Is there anything that I could ask Mr. Tabler or
10 any way I could ask it or anything that he could say to you
11 that would convince you that what he is saying is of the
12 same character as someone who is not operating from a place
13 of deficit or limited cognitive ability or is he stuck?

14 A. In many ways he's stuck. I truly believe that
15 were the Court able to waive its judicial wand and change
16 his conditions of confinement, to allow him treatment for
17 his Klinefelter's and his whatever disorders, to allow him
18 to have contact with family, to take him off of the death
19 watch situation and back onto death row into what everybody
20 else experiences there, that he might very well reverse his
21 choice.

22 A lot of this is his personality disorder, his
23 borderline -- what borderlines do is they manipulate and I
24 view this as a borderline manipulation to get what he wants
25 and if I can't get what I want I'm going to make you put me

1 to death. And that's not a rational choice.

2 Q. what do you perceive him to be wanting now that
3 he's manipulating?

4 A. what he wants is out of the conditions, of the
5 confinement that he finds himself in, and he's made it very
6 clear that he can't take it anymore. I think were his words
7 this morning.

8 He's very clearly tied this decision to those
9 conditions.

10 MR. TABLER: Excuse me, Judge?

11 THE COURT: You can go ahead.

12 MR. TABLER: I just got a question for
13 Dr.~Martell.

14 THE COURT: Ask me and then I'll see if we can ask
15 him.

16 MR. TABLER: He sits here and he tells me all
17 these conditions and that is the condition where I'm at and
18 my confinement and everything that's bothering me and the
19 stress and everything leading up to this, I really can't
20 make the decision.

21 sure, it's got a little bit to do with it, it's
22 got a little bit to do with what each doctor has got up
23 there and said and what counsel has said. But the number
24 one thing is: Have you ever killed anybody before? Have
25 you ever taken a life? Do you know what kind of guilt lives

1 inside of me? The kind I can't forgive myself. That's why
2 I'm here.

3 You want to know everything about it? I'm here
4 for my victims, because I can't live with the guilt. I
5 can't forgive myself. That's why I am trying to waive my
6 appeals. That's my way out.

7 You want to call it suicide by State or whatever,
8 all right, that's what it is. But I refuse to sit here and
9 let everybody speak like I'm not even in this courtroom.
10 Everybody's here in this courtroom because I brought you in
11 this courtroom, right?

12 But whether I'm in confinement on death watch or I
13 watch my friends walk away and I hear on the radio at six
14 o'clock from this show called Execution Watch and they are
15 saying they've been killed and they are dead, all right.
16 Yeah, it affects me.

17 But at the same time, every day it's like a
18 routine, that movie, Bill Murray, Ground Hog Day where he
19 drives over the cliff in a truck. Every day is a do over
20 and do over for me.

21 Every day I talk to God and I ask God to forgive
22 myself, and I can't. I can't. I can't give these lives
23 back.

24 I took these lives, and everybody is sitting in
25 here speaking about me and my position and all that. What

1 about my victims' family? What about the four lives I took?
2 why don't anybody talk about them?

3 Can you give me their lives back? Can you give me
4 peace of mind? Can you take this guilt away from inside of
5 me, whether or not whatever mental condition you try to say
6 I have?

7 The Judge finds me incompetent, he sends me to a
8 mental state hospital to get fixed and come back in front of
9 you. But how can you help me get rid of the demon inside of
10 me and the guilt? How can you help me forgive myself if I
11 cannot forgive myself?

12 I'm in this courtroom. Remember that.

13 THE COURT: Thank you, sir.

14 All right, is there anything you would like to
15 add?

16 THE WITNESS: No.

17 THE COURT: Thank you. Any other questions?

18 MR. NOLAN: No, sir.

19 THE COURT: Thank you.

20 May this witness be released?

21 MR. NOLAN: Yes.

22 THE WITNESS: Thank you, Your Honor.

23 THE COURT: Thank you very much.

24 why don't we take a fifteen-minute break.

25 MR. NOLAN: Just to let the Court know, we have

1 one final witness and we think we can do that in forty-five
2 minutes.

3 THE COURT: That's my hope.

4 Okay, thank you very much.

5 (Whereupon, a recess was then taken.)

6 THE COURT: Okay, your next witness?

7 MR. TABLER: Judge, I have a couple of questions,
8 please.

9 THE COURT: Oh, yes, sir. Sure.

10 MR. TABLER: Earlier when a couple of doctors got
11 up there, took the stand and said that, you know, they felt
12 that my Klinefelter's or my alcohol spectrum disorder or ADD
13 and all this kind of took away that I didn't have any
14 artistic skills or I wasn't able to verbally understand
15 certain words.

16 If you authorize it, one of my attorneys,
17 Ms.~Widder, who I've done numerous -- for my counsel -- I've
18 done portraits and drawings. She has a picture of her
19 daughter, Sasha, on her laptop. I did a portrait and I
20 would like you to take a look at it, show you that what
21 everybody's saying -- I'm not retarded, basically. I've got
22 sicknesses or whatnot. When I draw, it's another way of
23 escape, you know.

24 I would like you to take a look at it, if
25 Ms. Patton doesn't mind or anything else, so that you can

1 see that -- because you asked -- you told me basically I can
2 get up here and I can give you what I want into evidence or
3 whatever to show you on my behalf, I would like to you take
4 a look at this.

5 THE COURT: Absolutely. Is that something that
6 actually could be reproduced?

7 MS. WIDDER: I can email it.

8 THE COURT: That would be great, I would like an
9 opportunity to see that and the State as well.

10 MS. PATTON: No objection.

11 THE COURT: We'll give you an email address to
12 forward that, and I'm also going to give you an opportunity
13 to do any post-hearing briefings and so you can include that
14 as an exhibit, however you would like to do it, but I would
15 very much like to see it.

16 MR. TABLER: I also have a question, right. I'm
17 just curious, your being a federal judge, my situation, the
18 AG over there, do you have the power as a judge to order the
19 Texas Department of Criminal Justice to reinstate my
20 visitation with my family?

21 THE COURT: That's an interesting question. I
22 don't in the absence of a lawsuit that someone would file
23 that would be alleging that whatever the conditions of your
24 confinement, that being one of them, were unconstitutional
25 in some regard or violated some federal law; and so I can't

1 do that just from the bench like this or just because you
2 asked for it. But your lawyers can talk to you in more
3 detail about how to go about complaining about circumstances
4 like that and what the limitations of the federal courts are
5 in giving you release -- relief from things like that.

6 But it's not something that I can just do by you
7 asking for it, it would have to be as a result of something
8 that your lawyers would have to file on your behalf.

9 MR. TABLER: I was just curious.

10 THE COURT: That's an obvious question, sure.

11 MR. TABLER: I also want you to know that that
12 doesn't change my opinion. We're still here.

13 THE COURT: Okay, I got it. I appreciate that.
14 Great. Thank you.

15 MR. TABLER: But um . . .

16 THE COURT: Thank you very much.

17 Okay, your next witness?

18 MR. WALKER: Call Dr. Keith Curry.

19 THE COURT: Good afternoon. Could I get you to
20 raise your right hand, please.

21 KEITH R. CURRY,
22 was called as a witness and, having been first duly sworn,
23 testified as follows:

24 THE WITNESS: I do.

25 THE COURT: Thank you. Please be seated.

=====

DIRECT EXAMINATION

=====

BY MR. WALKER:

Q. Dr. Curry, good afternoon.

What's your occupation, sir?

A. I'm a clinical psychologist.

Q. And have you worked in corrections before?

A. I have worked in correctional facilities, prisons and jails, from 1983 until 1997.

Q. And how long have you done forensic work?

A. For the last twenty years.

Q. And can you tell us a little bit about your experience and specialty regarding conditions of confinement work?

A. I've testified or written reports in numerous cases regarding conditions of confinement and especially their effects on people suffering from mental illness.

Q. And if you could flip to Exhibit 28, Page 6 of the binder up there, please. The second volume, maybe.

A. Yes.

Q. Okay. I'm sorry, the seventh page.

Is that a recent copy of your CV?

A. Yes, it is.

Q. And is it accurate?

A. Yes, it is.

1 MR. WALKER: We would move to enter Dr.~Curry's CV
2 for the record, Your Honor.

3 (Whereupon, Petitioner's Exhibit No. 28
4 was offered.)

5 THE COURT: Any objection?

6 MR. CLENDENIN: No objection.

7 THE COURT: Without objection so admitted. Thank
8 you.

9 (Whereupon, Petitioner's Exhibit No. 28
10 was received in evidence.)

11 MR. WALKER: And we would move to admit Dr. Curry
12 as an expert in psychology.

13 THE COURT: Without objection?

14 MR. CLENDENIN: No objection.

15 THE COURT: I'll recognize him as an expert.

16 MR. WALKER: Thank you.

17 THE WITNESS: May I interject for a moment?

18 MR. WALKER: Yes, sir.

19 THE WITNESS: I can't hear you very well.

20 MR. WALKER: I'm sorry, I'll try to speak up.

21 Q. (By Mr. Walker) Dr.~Curry, how did you become
22 involved in this case?

23 A. I was contacted by your office.

24 Q. And what did we ask you to do?

25 A. To evaluate and provide opinions regarding

1 Mr. Tabler's ability to voluntarily waive his habeas appeal.

2 Q. And if you could flip to Exhibit 28, Page 1,
3 please.

4 A. I'm sorry?

5 Q. If you can flip to Exhibit 28, Page 1, please.

6 A. Okay.

7 Q. Do you recognize that document?

8 A. Yes, I do.

9 Q. And is it a copy of your report in this case?

10 A. Yes, it is.

11 MR. WALKER: We would move to -- like to move
12 Dr. Curry's report into the record.

13 (Whereupon, Petitioner's Exhibit No. 28
14 was offered.)

15 MR. CLENDENIN: No objection.

16 THE COURT: Without objection so admitted.

17 (Whereupon, Petitioner's Exhibit No. 28
18 was received in evidence.)

19 MR. WALKER: Thank you.

20 Q. (By Mr. Walker) Now, in performing your
21 evaluation of Mr. Tabler, were you provided background
22 materials?

23 A. Yes, I was.

24 Q. And are those listed in the first two pages of
25 your report?

1 A. Yes.

2 Q. And have you reviewed any additional materials
3 since then?

4 A. Yes, I did.

5 Q. Can you tell me what they were?

6 A. Dr. Arambula's report or TDCJ custody records and
7 some correspondence with the court.

8 Q. Thank you.

9 And I would like to talk to you today about -- as
10 to your report -- the impact of Mr. Tabler's Klinefelter's
11 syndrome and fetal alcohol spectrum disorder. Can you
12 discuss or tell us how those conditions manifest in
13 Mr. Tabler?

14 A. I focused mainly on the effect those two disorders
15 have on his executive functions and his perceptual
16 disturbances and the way they informed his decision
17 regarding his waiver.

18 Q. And can you tell me, I guess, how those conditions
19 impact his executive functioning?

20 A. Yes. Fetal alcohol spectrum disorder more so than
21 Klinefelter's but both have direct effects on a person's
22 brain development during childhood and therefore their
23 development of executive functions including things like
24 emotional regulation, behavioral regulation, future
25 planning, things of that sort, similar to what the other

1 experts have testified to.

2 Q. And in reviewing Mr. Tabler's history, do you see
3 signs of deficits regarding executive functioning such as
4 emotional dysregulation?

5 A. The records regarding his past were replete with
6 many examples of poor executive functioning.

7 Q. And can you tell me a little bit about the
8 perceptual distortions?

9 A. What I mean when I say perceptual distortion
10 mainly goes to his perception of slights, insults,
11 challenges, physical dangers and the way he reacts or
12 overreacts to those things in his environment.

13 Q. How is the way that he reacts to those different
14 from the way a person without those distortions would react?

15 A. When you talk to Mr. Tabler in a setting like this
16 or when I interviewed him at the prison, one to one in a
17 safe environment, he presents as he does today, he's calm,
18 reasonable, he can control himself. There's some minor
19 peculiarities but mostly he presents pretty well.

20 when he feels insulted or challenged or in danger,
21 he's very easily tipped over into an entirely different
22 state where he essentially goes off, is the way he describe
23 it, impulsively, in a highly reactive way. And as a part of
24 his executive dysfunction he does disseverate so he shares
25 that disquality that other people with fetal alcohol

1 syndrome have.

2 Once they start to go off they don't really stop,
3 they just repetitively push the boundary farther and farther
4 until somebody else stops them, that's a way of getting
5 yourself into bad trouble. So, as long as he's in a setting
6 where he feels that he's safe, you know, his perceptual
7 disturbances don't really cause a problem, but of course in
8 the real world and in prison this happens all the time.

9 And so, it's -- he goes from looking like a
10 perfectly reasonable person to looking pretty wild and out
11 of control and he's unable to stop himself.

12 Q. And one of the things you just said was temporal
13 discounting; is that correct?

14 A. Yes.

15 Q. Can you explain that phenomenon or condition?

16 A. Temporal discounting is under the umbrella of
17 executive function so we all engage in some degree of
18 temporal discounting, that is assigning more weight to
19 rewards and punishment in the present than we do farther out
20 toward the distant past.

21 This is a pretty important executive function that
22 we develop during childhood. If you look at four year olds,
23 they have very poor ability to weight the future
24 consequences in terms of rewards and punishment as compared
25 to right now, but we, for the most part, learned this over

1 the course of our childhood, not so well that for instance
2 people don't smoke despite knowing it's going to kill them
3 forty years later.

4 In Mr. Tabler's case, more than most people and
5 maybe more than anyone I've known, he really appears to live
6 in the present. Exclusively in the present. So his
7 temporal discounting is extreme. So that it looks like
8 there's no future cost that he won't trade off for some
9 current gain, some current escape or some benefit. Some
10 win.

11 He can describe what's happening in the future, he
12 can describe those possible consequences but I don't think
13 he weights them properly, if at all. It's an important
14 consideration for his diminished or poor executive
15 functions.

16 Q. So you mentioned that Mr. Tabler can describe the
17 consequences in the future, that would include, for example,
18 his colloquy today and sort of stating that he understands
19 what will result from his waiver, is that still consistent
20 with his temporal discounting them?

21 A. I think he can describe them but I think they're
22 abstractions in their -- they don't fare very well against
23 the concrete present moment.

24 MR. WALKER: May I approach the bench, Your Honor?

25 THE COURT: Yes, you may.

1 Mr. Walker, if you don't mind, my clerk has told
2 me that we didn't get document numbers -- or exhibit numbers
3 for the CV or the report.

4 MR. WALKER: I apologize, Your Honor, the CV and
5 report are actually labeled under the same exhibit number,
6 it's Exhibit Number 28.

7 THE COURT: Twenty-eight?

8 MR. WALKER: Twenty-eight, yes.

9 THE COURT: Thank you very much.

10 Q. (By Mr. Walker) Dr. Curry, I've handed you a
11 document labeled Plaintiff's Exhibit 76. Can you tell me a
12 little bit about that document, how it came to be, for
13 example, and what it is?

14 A. What I understood from the discovery was
15 Mr. Tabler had asked custody staff if he could see a
16 mental-health provider and corrections officer suggested --
17 I suppose in the interim -- that he should write down his
18 feelings or his wants so that he could more -- in some way
19 more easily present those to a provider, so he then wrote
20 this list.

21 Q. And what's the significance of this document in
22 relation to Mr. Tabler's decision-making skills?

23 A. Well, there are a couple of things. I mean, when
24 we're talking about executive functions, we've all mentioned
25 perseveration.

1 Perseveration is really not just repetitious, it's
2 a machine-like repetition that goes on in a way that is not
3 rational or not -- it stops making sense pretty quickly so
4 that it becomes self-defeating.

5 So he started out, I suppose, describing what he
6 wanted in that he was going to provide it to the
7 mental-health practitioner, but then he just -- he kept
8 going.

9 It starts on page one -- I believe there's
10 eighty-something -- eighty-three bullets there. There's a
11 lot of repetition in here but it doesn't -- it doesn't make
12 sense, in terms of what he was trying to achieve.

13 Let me read, just -- I won't go through all
14 eighty-three, but just to give you a flavor of what he was
15 writing.

16 I'm assuming -- I was a mental health clinician in
17 prisons and jails for a long time -- and what he's
18 describing here is distress. So I would have looked at this
19 more -- I would have looked at the gestalt of it and
20 understood that he was trying to tell me he was in distress
21 but the way he does it sort of defeats the purpose.

22 So let me just read a few off the top and maybe a
23 couple off the bottom. So what does he want? He wants to
24 kill himself. He wants to cut my right arm from wrist to
25 elbow. He wants to slit my shoulder open from navel to

1 chest. He wants to slit my throat from ear to ear. Hang
2 myself from the middle of the outside rec yard. I want to
3 die. I'm a monster. Officer GM is scared of me, which
4 makes me feel like a monster. I hurt so bad and I'm scared
5 of myself. It goes on and on.

6 Down in the eighties: I can't handle this
7 isolation anymore. I don't believe anyone from mental
8 health or security, not including the pod officers, want me
9 to get help but rather I do kill myself ASAP, can't stop
10 thinking about killing myself and Officer Douglas wards, et
11 cetera.

12 It's a pretty good example of poor behavioral
13 regulation, poor emotional regulation, perseveration. It
14 just has several elements of executive dysfunction in it.

15 I didn't get the chance to ask him what he was
16 trying to convey in this but I think you could just go by
17 the flavor of it.

18 It looks like he just couldn't stop writing,
19 essentially. He's like going through every iteration until
20 he runs out of iterations. Does that make sense?

21 THE COURT: Could you remind me what the
22 instructions were? what he was asked to do that yielded
23 this?

24 THE WITNESS: I read that correction officer's
25 note about it, it was write down -- I am just going to ask

1 him, write down your -- what you want and feel so that when
2 you see the mental health practitioner, you know, they will
3 know what to do.

4 THE COURT: Thank you.

5 Q. (By Mr. Walker) Is Mr. Tabler's history with
6 vacillation regarding his waiver significant as well?

7 A. Yes. I think the way to understand his
8 vacillation over the last ten years, the ten switches in ten
9 years, goes to his living in the moment. So that I take
10 Mr. Tabler at his word as he sits there about what he says
11 about execution and the waiver but it's in the moment and
12 the moment changes. It's not just his circumstances it's
13 the circumstances matter and they are difficult, but his
14 variability is just an essential characteristic that's a
15 life-long trait.

16 when he makes mistakes that get him into trouble
17 it -- it looks like he's unable to predict the future
18 because no, he'll make a mistake, cognitive error someone
19 with his IQ shouldn't make, that's really what's diagnostic
20 about it.

21 He has a IQ of 80, but he'll make mistakes that a
22 person would only make if their IQ was 50, so somehow you
23 have to account for that, and he does it repeatedly. When
24 he's in a calm and safe setting he looks like this IQ, he
25 looks fine. Under pressure, under risk or danger he looks

1 different in this way.

2 MR. WALKER: The Court's indulgence for a moment,
3 Your Honor.

4 THE COURT: Please.

5 Q. (By Mr. Walker) Dr. Curry, do you have an opinion
6 as to whether Mr. Tabler will change his mind regarding this
7 present waiver in the future?

8 A. Um, I can speculate. I would expect that he
9 would, for these reasons. At least I would be -- I would be
10 wary.

11 Q. Thank you.

12 Now, I would like to ask you about the conditions
13 under which Mr. Tabler's housed. When you interviewed
14 Mr. Tabler, did you discuss the conditions under which he
15 lives?

16 A. Yes, I did.

17 Q. Can you describe them for me?

18 A. He's in a death row single cell, 10 foot by 6, has
19 a vertical slot window, he's fed through a slot in the door,
20 he's locked in a cell 24 hours a day, it's confining and
21 isolative.

22 Q. And I think we've heard here today, you can affirm
23 this if you care to, is Mr. Tabler housed in the general
24 death-row population or is he housed --

25 A. No, for the last ten years, nine or ten years, he

1 has been on death watch.

2 Q. And is he permitted to have recreation or
3 interaction with any inmates who are not on death watch?

4 A. My understanding is that he has only interactions
5 with people on the death-watch unit.

6 Q. Which is to say his only interactions are with
7 guards and inmates awaiting execution; is that correct?

8 A. That's my understanding.

9 Q. And does he have any face-to-face contact with
10 these fellow inmates while he's in his cell?

11 A. Not while he's in his cell, at least that's my
12 understanding.

13 Q. And there's a camera in his cell as well?

14 A. Yes, there's a 24-hour camera.

15 Q. And are there any ways in which Mr. Tabler's
16 conditions are more exceptionally restrictive than the other
17 conditions you would encounter on other pods in death row?

18 A. I think he is socially isolated in a way that most
19 people are not. So, there are restrictions on his mail,
20 there are restrictions on his visits, and now the
21 restrictions to social interactions only with people who
22 will soon be executed are pretty severely restricting in
23 terms of his interpersonal life as compared to anyone that's
24 on the regular death row cell block.

25 Q. And the restriction on his mail and family

1 visitation, how would those go towards making his isolation
2 greater?

3 A. I think -- and this would be true for anyone who
4 is incarcerated -- visits and mail and possibly phone calls
5 tether people to the outside world in a way that keeps them
6 relatively sane and able to function day to day.

7 But in the absence of that, I think people become
8 untoward and internally isolated.

9 Q. I would like to talk about the psychological
10 effect of the isolation of death row or administrative
11 segregation. Can you tell me about the impact that those
12 conditions would have on a so-called normal inmate or
13 someone not suffering from mental illness?

14 A. Generally speaking, the conditions that are called
15 solitary confinement in the vernacular would apply here to
16 ad. seg., could cause pretty much anyone to become
17 irritable, sensitive to external stimuli, anxious, agitated.

18 Most people, if they're isolated long enough, will
19 sort of lose their diurnal sleep cycle, suffer from insomnia
20 and nightmares. And some people will do better and some
21 people will do worse but they all have some version of that.

22 Q. And how will those conditions impact someone who
23 is mentally ill such as Mr. Tabler?

24 A. My understanding of Mr. Tabler, he's already
25 fairly isolated within himself, in part due to his living to

1 such an extent in the present. So, that would just be --
2 he's poorly equipped for that in the first place, I'll say
3 that.

4 He doesn't have the coping skills that help a lot
5 of people in administrative segregation, he doesn't have the
6 eternal life that helps people. Most people, could just say
7 the average -- average person, see themselves in the context
8 of their lives so there's a timeline, and they have a past
9 and they've had relationships with people and family, they
10 may or may not -- they may see some kind of future whether
11 it's bleak or not but they can understand that there's a
12 future.

13 I think to a large degree Mr. Tabler, living in
14 the moment, is more like the points on a timeline, so, it's
15 understandably harsh to be on death row. For him, his
16 present moment is his only thing, so if his present moment
17 is harsh it's really harsh, it's not buffered by his -- the
18 rest of his life essentially.

19 Q. Dr.~Curry, if you can -- I believe the exhibits
20 are up there, Doctor, if you could look at Exhibit 69,
21 please.

22 A. Which one?

23 THE COURT: I'm sorry, to do that the clerk has
24 indicated that we already have a 76 which is the last one
25 you admitted.

1 MR. WALKER: I apologize.

2 THE COURT: We need to make that 77, the next
3 available number.

4 MR. NOLAN: It was my fault.

5 THE COURT: That's okay, we just want to make sure
6 we keep up with it.

7 THE WITNESS: Is it here?

8 MR. WALKER: It should be up there.

9 THE WITNESS: Which one is it?

10 MR. WALKER: Correctional managed care nursing
11 program.

12 THE WITNESS: Okay. Is it marked 68?

13 MR. WALKER: I believe 69.

14 Q. (By Mr. Walker) So this is a -- can you describe
15 this document for me?

16 A. It is a nursing protocol for some muscular
17 skeletal symptoms that he presented at the clinic with.

18 Q. And if you could read from the document halfway
19 down the page beginning with, "States that if the execution
20 goes through"?

21 A. I'm sorry, I'm still having trouble hearing you.

22 Q. I'm sorry.

23 If you could read from the document beginning
24 about halfway down the page that states, "If the execution
25 goes through Sunday" -- "goes through Thursday" --

1 A. Okay.

2 This is under Nursing Action. "Offender states
3 his body may seem hot but he seems to be freezing all of the
4 time. States he cannot sleep at night due to being so cold.
5 He states he is extremely stressed, mentions he is stressed
6 because of living with a camera on him 24-7; states if the
7 execution goes through Thursday then that will be the
8 68th person he has gotten to know or become friends with who
9 have died."

10 Q. And what's the date on the document?

11 A. 6-3-2017.

12 Q. So is it safe to assume that in the last year or
13 so that that 68 number is now higher?

14 A. Based on the rate that I understand they go
15 through the death-watch unit, I think that sounds accurate.

16 Q. Is there any reason that these repeated losses
17 would be more traumatic to Mr. Tabler than they would to a
18 person like you or I?

19 A. well, I suppose in the first place, his childhood
20 was tragic and traumatizing. The people in his life left
21 him in ways that were very hurtful and I think that really
22 formed his adult ability to relate to people, and so, I
23 think he is reluctant to actually relate to people in any
24 sort of intimate way but he does do it nonetheless and then
25 when he does do it and they then get executed, I think it's

1 just retraumatizing and brings up issues from his childhood
2 that are very painful.

3 Q. And with regard to Mr. Tabler's social isolation,
4 does that also exacerbate the trauma that he would feel in
5 these losses?

6 A. Well, it does in the sense that if you are -- if
7 he's living in the moment the relationship he's having right
8 now is paramount, so he's been described as forming rapid
9 attachments, rapid intense attachments, I think that's a
10 fair description. I think that's really just a function of
11 his living in the moment.

12 So, it comes up powerfully and then when it goes
13 away it goes away powerfully because there's so little else
14 going on.

15 Q. Dr. Curry, do you have an opinion as to whether
16 Mr. Tabler, in light of his condition and confinement and
17 mental illness, is capable of making a voluntary waiver?

18 A. I do.

19 Q. And what is your opinion?

20 A. I believe that his inability to weigh future
21 consequences meaningfully against the present renders his
22 voluntariness suspect. I believe that he cannot actually
23 make a voluntary waiver.

24 Q. And if I can point you to Exhibit 40, Page 3,
25 please.

1 A. Page what?

2 Q. And I won't ask --

3 A. What page?

4 Q. Page 3 of Exhibit 40.

5 A. Okay.

6 Q. Can you describe that document for me, please.

7 A. It's the petitioner's motion to revoke his
8 previous motion for pro se and motion to withdraw wherein he
9 is describing why he wants to revoke his motion based upon
10 his -- the conditions where he is housed.

11 Q. Can you tell me about the significance of that
12 document?

13 A. Well, he's -- well, this document is describing
14 why the punitive isolation -- he thinks is punitive -- and
15 highly restrictive environment on that unit makes him want
16 to end his life one way or the other. That's how I read it.

17 Q. And is that document consistent with your opinion?

18 A. Yes. I believe -- if we take as a given that the
19 conditions are harsh, because they're understandably harsh,
20 I believe he feels that differently than most people and
21 more directly and more unalloyed than other people because
22 of the way he lives in the moment.

23 It's the absence of a past and a future for him.

24 MR. WALKER: No further questions.

25 THE COURT: Thank you.

1 Any questions from the Government?

2 MR. CLENDENIN: No, Your Honor. I just want to
3 make sure, though, that the last two exhibits were offered
4 into evidence. I don't know that they were.

5 THE COURT: What numbers were those? I think they
6 were already in.

7 MR. WALKER: Number 40 and Number 68.

8 (Whereupon, Petitioner's Exhibits 40 and
9 68 were offered.)

10 MR. CLENDENIN: No objection.

11 No questions either. Thank you.

12 THE COURT: So, Dr. Curry, if I can follow up, and
13 some of the questions will be along the lines of what I
14 asked the other gentlemen.

15 =====
16 EXAMINATION
17 =====

18 BY THE COURT:

19 Q. So with regard to your description of Mr. Tabler's
20 propensity to sort of be in the moment, to live in the
21 moment, you know, again, this is a question for a
22 philosopher rather than a psychologist perhaps but if -- if
23 he lives in a ceaseless stream of present moments and there
24 is some consistency with regard to his expressed desire in
25 those moments, as there has been on the question of whether
or not he wants to waive his rights, is there some point at

1 which I could have reasonable confidence that what he's
2 expressing in those individual moments over time is
3 genuinely felt and is not affected by some of the things
4 that you've identified?

5 A. I think that, based on my observations, that it
6 tends to be genuinely felt in that moment and so the fear I
7 would have is at some other moment he genuinely feels
8 something else because I think that's what I've seen.

9 Q. Do you understand too I have the fear -- the twin
10 fear that those being authentic desires in each moment that
11 he expresses them and that I'm failing to recognize a
12 rational and honestly expressed and independently arrived at
13 desire -- expression of a desire, do you understand I have a
14 twin concern there?

15 A. Yes. I think when you see Mr. Tabler under these
16 circumstances in this moment he looks as you just described
17 him.

18 Q. But when he's had those other moments, at least it
19 has not been communicated to me that in those moments where
20 he is less than perhaps composed, even then he has not
21 communicated to me a desire to change course or to have me
22 do other than what he's asked me to do repeatedly.

23 So you would expect if he was going to have a
24 change of heart, when he's having these moments that I don't
25 see, that that would manifest perhaps in a communication to

1 me, written other otherwise communication to me that would
2 be inconsistent of what he's been asking me when he is with
3 me.

4 A. So I'm not a lawyer but the way I've read his
5 other pleadings, I believe it's correct if he changes his
6 mind something like ten times.

7 Q. Before he got to me?

8 A. Before he got to you.

9 Q. Exactly.

10 Does that prevent him from at some point in the
11 future and for the past, however long it's been that this
12 has been pending in front of me, does that change his
13 ability then to make that decision and stick with it as he
14 appears to be doing now?

15 A. I'm skeptical of his ability to do that.

16 Q. I get that. Then that leads us to the question
17 that I asked the previous witness and that is that we find
18 ourself in a situation where -- and what struck me in the
19 concluding parts of your report really motivated my
20 questioning to the last witness and I was going to save them
21 for you but they became I think appropriate for him.

22 And that is when you -- as the previous witness
23 described perhaps the circumstances of his confinement as
24 being to a person that didn't have the challenges that he
25 has would find unbearable, and so what that presents us with

1 is that he's being further sort of penalized for his
2 deficits by being denied what someone under the same
3 circumstances would be allowed to make decisions about their
4 future and about -- and so effectively he's being penalized
5 yet again by us not giving him the opportunity that someone
6 without those deficits would have.

7 Is that a fair assessment?

8 A. I understand. Yes, that's correct. The deficits
9 that I'm describing are the deficits that got him here and
10 he still has them, so I understand that's a -- I don't want
11 that burden.

12 Q. So I have to ask you then, is there anything,
13 then, at this point, I could ask him or is there anything at
14 this point that he could tell me that would satisfy you that
15 your opinion about that you've expressed here today might
16 not --

17 A. I think not in this moment.

18 For me this was temporal. How does it play out at
19 the time? So at any given moment you only have what's in
20 front of you and right now I don't think there's a question
21 you can ask that would satisfy that.

22 Q. But then going back to my initial question, is
23 there a point at which in weeks or months that he would
24 exhibit a consistency of commitment to this position that
25 would satisfy your concerns?

1 A. That's very subjective.

2 Q. All of this is objective.

3 A. I know. For me, no, there's not a threshold.

4 Q. Where was the threshold that got you where you are
5 then? There had to have been a threshold.

6 A. Well, it's because I can look back at the past,
7 because I can see the past. It's the ten vacillations in
8 ten years.

9 If he had waived once -- if this was his first
10 attempt to retract the waiver, I would have it to go on, but
11 I have nothing to go on. But he's established a record
12 that's hard to ignore and it makes one wary and cautious.

13 THE COURT: Sure. I understand, okay.

14 Any other questions?

15 MR. WALKER: No, sir.

16 THE COURT: Okay, thank you very much.

17 THE WITNESS: Thank you.

18 THE COURT: Can this witness be excused?

19 MR. WALKER: Yes.

20 THE COURT: Okay. Thank you, Doctor.

21 Do you have any other witnesses or evidence?

22 MR. NOLAN: No, we don't, Your Honor.

23 I would move for the admission of the remaining
24 exhibits in the binders.

25 THE COURT: Okay, if we haven't done that, any

1 objection for purposes of this hearing?

2 MR. CLENDENIN: With the same caveat, no
3 objection.

4 MR. NOLAN: We removed some of them as we went but
5 I think maybe just for housekeeping.

6 THE COURT: What would you like to do now? Would
7 you like to hear any argument -- let me first perhaps see if
8 Mr. Tabler, given what he's heard today, if he has anything
9 left to add or ask.

10 So, Mr. Tabler, we have completed the evidence in
11 the case, I've heard all of the witnesses that I think are
12 going to be presented in the case, and I want to loop back
13 around and give you the opportunity -- and I'm glad you've
14 taken the opportunity to kind of chime in a couple of times
15 on things as they've gone because sometimes it's hard to
16 remember as you go along.

17 So is there anything that has come up that you
18 would like to address or do you have anything else that you
19 would like to tell me or ask me, frankly?

20 Let me say before I put that pressure on you, I'm
21 also going to give you the opportunity, after we leave here
22 today, I'm going to give everybody a couple of weeks to
23 present things on the record because if you're like me it's
24 only on the drive home that you remember all the things that
25 you should have said or that you -- as you think about it

1 tomorrow.

2 MR. TABLER: I'm not that old.

3 THE COURT: Well, I am.

4 But in all seriousness, sometimes you think much
5 clearer the next day and we've had a long day.

6 But, anyway, I don't want you to feel like this is
7 the only opportunity you have. If in the days to come
8 something occurs to you that you haven't thought of saying
9 or that you want to emphasize, I will give you that full
10 opportunity to write that down and send it to me.

11 But, as we sit here today, is there anything that
12 you would like to say?

13 MR. TABLER: No.

14 I tried -- I tried to bring other people up in
15 conversation. I came in the courtroom, I recognized one
16 individual in the courtroom, I couldn't remember his name so
17 I asked my counsel, he was a district attorney from Bell
18 County. It was a man in the very back, the black gentleman
19 back there.

20 And so I'm sure if you asked him why everybody's
21 here I think he would probably agree with my situation as
22 well, you know.

23 What about Amid? What about Frank or Tiffany or
24 Amanda? You know, nobody talks about them.

25 This is not an easy decision, you know. During

1 the recess, I had my investigator tell me something, you
2 know, and that weighs heavily on me, you know.

3 I come up here, drive up here with Sergeant
4 Finkelberry, Officer Kaiser, Officer Smith, the conversation
5 I carry on with them, we following a GPS up here, you know.
6 You ask them -- I'm not trying to put them on the spot --
7 but the conversation is intelligent conversation. It's
8 mature conversation. It's not retarded conversation, is
9 basically what I'm trying to gather here, is what
10 everybody's trying to say. I've got this illness, I can't
11 make decisions, his confinement is doing this or whatnot.

12 You ask my transportation officers, you ask the
13 deputy over here in your courtroom how I've behaved since
14 I've been back here. I'm respectful to all of you staff,
15 even TDCJ staff, you know.

16 For somebody that can't speak and be respectable
17 or intelligent, then I might agree with some of these
18 doctors. But then, again, my counsel paid for the majority
19 of doctors that took the stand today, you know.

20 You appointed Arambula so I didn't think they had
21 an opportunity to dig their hooks in him because he was
22 appointed by you. You picked him out because neither one of
23 us can agree, the State nor my counsel, and then you said
24 you would give me an opportunity to provide evidence for
25 what I wanted to see to prove myself.

1 The attorney general, Ms. Patton, right. TDC
2 copies all my outgoing mail, all my outgoing mail except for
3 my legal mail that's sealed and confidential.

4 If she was to get copies from TDCJ Warden Harris
5 Director Lori Davis, you can read all my letters from the
6 time I rolled up on death row in April of 2007, and none of
7 my letters talk like these doctors got up on the stand and
8 belittled me, tried to degrade me like I was a child.

9 Even now days children kill, do they not?

10 I've read recently about a thirteen year old
11 picked up a pistol and shot another kid because he was
12 gangbanging. You have all this violence going on, what
13 about all these other people; but yet it comes around full
14 circle. I ask you again about Amid, Frank, Amanda and
15 Tiffany, who is going to voice and talk -- who is going to
16 talk for them? who is going to speak for them?

17 Sitting here, ask God for forgiveness, it's easy
18 to ask him, he forgives everything.

19 I've asked my mother; my mom's boyfriend, Bill; my
20 spiritual adviser, Mary Hamilton. My best friend that was
21 executed July 2017, Vic Tai, his attorney tell me they
22 understand. They understand my decision. They might not
23 support it all the way because it goes against their
24 standards and what they believe in, but yet at the same time
25 my mother told my investigator Sandra Belter that she

1 doesn't want to continue seeing me suffer back here, but yet
2 at the same time she doesn't want her son to die.

3 And I told you when I came into this courtroom
4 that if she stood up and said that not for me to do this, I
5 tell you what, we're done, I'm not going to drop it. But
6 she didn't do that. She left it in my court.

7 It's hard for me to sit here and talk to you. I'm
8 a grown man. I know right and wrong.

9 But to tell you, yeah, I'm done, go ahead and kill
10 me, no sane person wants to do that. But yet Shawn Nolan
11 and Peter Walker got up there and told you, doctors got up
12 there and told you my confinement, yeah, my confinement is
13 that bad. It doesn't change the fact that I killed people.
14 I took those lives.

15 When I went to jury trial back there in Bell
16 County I acted like an immature punk. I was a kid. Kind of
17 laughed, shit giggled about it. I thought it was funny.
18 I've had years, over a decade, to sit and think about that
19 and if I could apologize to the families in that courtroom
20 that day, I would do it a hundred times over.

21 I'm matured and I've grown since I've been on
22 death row, whether it be death watch or isolation, whatever
23 you want to call it, Jester IV.

24 It's like -- it's like this, Judge, hypothetical,
25 right, you take two puppies, got two puppies, take one

1 puppy, take them home giving them loving tender care, you
2 pet them, you walk them, you play with him. He is a family
3 dog. You take that other puppy put him in a cage and throw
4 things at him, beat him with fists and you abuse him and you
5 get a violent dog.

6 My confinement is making me violent. I know I
7 might not show it because I choose not to show it. I'm
8 controlling it the best I can. But in my own, I'm asking
9 you to do what I'm asking you to do today and that is to
10 waive my appeal and volunteer for execution, because, one,
11 my victims. I take responsibility for my actions.

12 I was sentenced to death. I believe in capital
13 punishment. My lawyers don't -- three of them. Those that
14 know they're guilty and they are sentenced to death should
15 be executed. Sexually violent predators and child molesters
16 should have been shot right there in the dang court. They
17 shouldn't be given all these opportunities.

18 I'm back there on death row and there's animals
19 worse than me. I talk to them. I don't talk to them about
20 their case. The one that I was close to his name was
21 Taichin Preyor. He was executed July 27, 2017, at 9:07 p.m.
22 I knew him for a decade, from the time I rolled up to TDC on
23 death row. We bonded.

24 He was a 6'6 270 pound, black dude with bald head.
25 And he and I would laugh. We would study the Koran and the

1 Bible together, go outside, we would play dominoes, we would
2 spread together and share. We got to know each other for
3 the human beings we are not the animals that we were.

4 People don't look at how we are now, all they see
5 is what we did from our past.

6 I've had a decade to mature and grow. I'm not the
7 same person I was in 2004 when I took those lives. But at
8 the same time, I accept responsibility, just like when I got
9 busted with that cell phone call with State Senator John
10 Whitmire, a whole bunch of things got twisted around of what
11 was said.

12 Not one time did I deny responsibility. Every
13 time I've taken responsibility for my actions. Every time I
14 catch a case in TDC, I take responsibility for my actions.

15 Does it get me anything? Does it get me better
16 treatment? Hell, no. Do I get to see the people I love and
17 care? No.

18 But then, again, think, what about my victims? Do
19 they get to see their loved ones? I deal with that guilt.
20 I deal with that anger and that pain.

21 To this day I'm still unable to forgive myself.
22 My guilt is killing me from the inside out and it's only a
23 matter of time for my treatment -- not these gentlemen back
24 here, not anybody over here in this courtroom -- but from
25 where I'm housed, I'm treated in the most inhumane way you

1 can even imagine but I accept it because when you become a
2 man you accept responsibility for your actions, you deal
3 with it because I choose to deal with it.

4 I just got up there and they said I was suicidal.
5 The only one that spoke the truth up there on that stand was
6 Richard Cully, Dr. Cully. What he said, I cut, I cut to
7 reveal the stress. Seeing myself bleed, I would calm down.
8 When I cut on myself, it kept me from striking one of your
9 officers, one of these state correctional officers on death
10 row, because I would get so mad and I would get so
11 frustrated at myself I cut to relieve my pain. I cut to
12 relieve my anger.

13 I stopped cutting because I gave my word to that
14 woman that I wouldn't cut myself. I gave my word to God
15 that I wouldn't cut myself again. I haven't cut myself
16 since.

17 One time I wanted to commit suicide. I ain't
18 lying. I slit my arm from here to here, from my wrist to my
19 elbow. I flatlined three times on death row. I'm here now.

20 From that time on, May 20th, 2010, when I took my
21 life when I had my first execution date and I was given a
22 stay, I didn't want that stay. I didn't ask for that stay.
23 I took my life, and TDC saved my life and brought me back.

24 The first thing I did was I got out in window and
25 looked out there and asked God, I told God, it was starting

1 to sunset and I could see how the sky was changing and it
2 looked like Moses parted the Red Sea. I told God, If you
3 are real I want you to open my eyes and allow me to see you
4 because I am not seeing. Open my ears and allow me to hear
5 what I'm not hearing. Show me something, anything.

6 I kid you not, when the sun set, how it reflected
7 out of the sky it look like it was reversed. I was in the
8 sky looking down on the ground. I saw the world. The Red
9 Sea parted out of my head. I'm seeing it and whispering to
10 myself, God, it disappeared like that. So I was seeing gold
11 as far as my eye could see, walls, buildings, everything. I
12 told God, I see it. Thank you. It disappeared like that.
13 It was pitch black.

14 Lieutenant Brown, a couple of wardens, a couple of
15 sergeants were standing in my door with the officer and his
16 force team. I had been standing out there looking out my
17 window for four and a half hours. It was pitch black
18 outside. I turned around and I had tears coming out my
19 face. I still had blood all over myself from where I took
20 myself. I took my life.

21 I have a relationship with God. I felt my faith
22 go from there. I got spoke to about Scripture. The book of
23 Numbers in The Old Testament talks about if you strike
24 someone with a metal staff and you take his life, you are a
25 murderer and you should be put to death. Read further in

1 that scripture, it tells you also that you shouldn't be put
2 to death by one lone witness but by numerous witnesses.

3 I was in Bell County, the DA, numerous witnesses
4 out there. I wanted numerous who took the stand against me
5 and said how they knew me and said what I did, what they
6 knew. By those numerous witnesses that jury found me guilty
7 of capital murder. I was sentenced to death.

8 And you got people telling me that that's the old
9 law, that's The Old Testament. That's true. You're
10 supposed to go by the New Testament. But the Old Testament
11 was God's law, The New Testament was his son's law.

12 You can't have one without the other. It's just
13 like Ying and Yang, for every action there's a reaction. To
14 complete the sixty-six books, you have to have The Old
15 Testament and The New Testament.

16 I stand on The Old, ask you to respect my
17 decision, that's why I came here. I want to waive my
18 rights, volunteer for execution.

19 Because I know when I leave this place, sure, a
20 lot of people are going to be hurting. It's going to
21 devastate a lot of people. That woman right there, the man
22 sitting next to her, my spiritual adviser Selima, Cassandra
23 my counselor, and back onto death row I was befriended. She
24 understands. Do they like it? No. They understand.

25 Do you two understand? Do you accept it? I'm

1 sure you can.

2 will my counsel accept it? Hell no. They're not
3 even going to try. They trying to put the shoe on the other
4 foot. It's impossible. My lawyers and I are always going
5 to agree to disagree.

6 You've had numerous inmates coming from you, and I
7 have no doubt that this is a tough decision for you, because
8 like I said in that motion letter I gave you this morning,
9 you're a human being at the end of the day, the court
10 reporter, everybody in here, but it's not very often you are
11 going to hear a conversation that comes from an inmate that
12 tells you he's guilty and that he feels this way.

13 I speak to you as a calm man. Yeah, I can sit
14 here and bullshit with you and say I wasn't -- I wasn't
15 frustrated and all the doctors got up there and spoke like I
16 wasn't in this courtroom. A couple of times I talked down,
17 yeah, I want to remind you people I'm in this courtroom,
18 don't forget it, and I did that.

19 But at the same time, I felt that many things
20 weren't being told correctly and that's why I said it.
21 Because when I stood up in this courtroom and asked you to
22 swear me in to tell the truth, that's what I did. From day
23 one I've told the truth and taken responsibility.

24 Did they take responsibility?

25 THE COURT: If you can speak a little louder or

1 maybe pull the microphone a little toward you. Thank you.

2 MR. TABLER: I said can these three take
3 responsibility? Probably not.

4 Can they understand where I'm coming from? No.
5 Nobody in this courtroom can understand where I'm coming
6 from until you are treated that way, until you take a life.

7 Last week, last Thursday, I spoke to Ms.~wider on
8 the telephone call, legal telephone call. She told me she
9 didn't want me to do this. I've been hearing that for the
10 past couple of months, you know, from all my counsel,
11 investigators and paralegals and a couple people. But, I
12 told her like this, there is something wrong -- there's
13 something wrong with me and I realize it when I can take a
14 life and act like it ain't shit -- pardon my French -- and
15 it doesn't bother me, I can go on about my day, I can eat, I
16 can still go party, do whatever. I look back on myself and
17 reminisce from my death-watch cell. That right there is an
18 animal, Judge. That same animal is still within me and I
19 can feel it and it scares the hell out of me.

20 Because, yeah, I'm behind a steel door, I got mesh
21 in my door, I can shoot stuff out my cell. I can stab one
22 of these officers. I can do something. I can take their
23 life any opportunity I come out of that cell but from day
24 one you ask that warden at that unit, warden Harris, and the
25 one before him, Timothy Simmons, you ask the correctional

1 officers, I refused. I didn't try. I refused to hurt one
2 of these guards for one reason: This is just a job. I
3 don't see the gray uniform. They are here to provide for
4 their family and pay their bills. This is what they do for
5 work to cut a paycheck. They didn't put me here, I put
6 myself here.

7 The only difference between them and I is they go
8 home at the end of the day but there's no guarantee they go
9 home. You could have a freak accident, you can have a heart
10 attack or a car wreck, or another guy could take their life.
11 Anything's possible. They didn't put me here and I refuse
12 to take another life that landed me here.

13 Again, that's why I ask you to please -- I know
14 you heard everything here today and I know it's a tough
15 decision. Take your time, read everything over, but I ask
16 you please to grant my waiver and allow me to volunteer for
17 execution.

18 With that I want to thank everybody for coming and
19 giving me this opportunity. I know it wasn't easy for
20 anybody. I just want to say thank you.

21 I also want to ask what your decision is about
22 that letter I gave you this morning?

23 THE COURT: We'll get to that. Let's get through
24 the rest of this and then I will address that.

25 We need a ten-minute court reporter break and then

1 entertain argument.

2 MR. NOLAN: I think we were going to ask to submit
3 argument in writing.

4 THE COURT: That's fine, sure. If you want to do
5 that that's fine, I will be happy to do it that way.

6 Could I have counsel approach?

7 =====
8 BENCH CONFERENCE
9 =====

9 (The following proceedings occurred at
10 the bench, outside the presence of Mr.
11 Tabler, with only counsel present.)

12 THE COURT: So, given the letter that he sent me
13 about having a visit with his mom, I'm inclined to give him
14 like a ten-minute noncontact visit with his mom unless
15 somebody thinks that would in any respect be prejudicial and
16 wouldn't be a good idea.

17 MR. NOLAN: We would love that, Judge.

18 MR. CLENDENIN: We would defer to the marshal.

19 THE COURT: Yeah, they've expressed to me that
20 it's contrary to their policy but they will do it if I order
21 it. That's the answer I always like. Thank you.

22 =====
23 OPEN COURT
24 =====

24 (The following proceedings occurred in
25 open court, with all parties present.)

1 THE COURT: All right.

2 So I would like to thank everybody for their
3 patience today.

4 Mr. Tabler, you're right, nobody in this courtroom
5 fully appreciates what you've gone through and what you're
6 going through now. And I appreciate the fact that you
7 recognize that I take this very seriously and this is, you
8 know, the most difficult thing that I do as a judge as it
9 requires me to make decisions about things that I don't have
10 perfect knowledge of and that's why I have the benefit of
11 experts on both sides and then I have the ability to listen
12 to you and to make my own evaluation of you.

13 Let me make -- in closing let me make a couple of
14 observations for you to think of because there's going to be
15 a couple of weeks that I'm going to give everybody to submit
16 anything they want to, post-hearing briefings, because as I
17 said, many times it's not until on the way home that you
18 think of something that you should have said.

19 Also, it's often the case, that when you have time
20 to reflect on what happened you have the ability to change
21 your mind and so, until -- I hear you -- until I make a
22 ruling in this case, I want you to reflect on a couple of
23 things, because you can change your mind and I know that you
24 seem very resolute and that you have a fixed mind about
25 this.

1 But let me just, on two points, let me address a
2 couple of things you've said. First of all you have implied
3 that you believe that by not seeing the legal process
4 through that somehow that's not accepting responsibility in
5 this case, and I want to tell you that that isn't -- I don't
6 share that view.

7 I think that you are entitled to both legally and
8 I think morally you're entitled to have the process play
9 out, and I don't think it reflects badly on you in terms of
10 you not accepting responsibility. I don't think it reflects
11 badly on you to let the process play out. And I think no
12 one would think that if you simply -- because as I said at
13 the very beginning of this, I'm not in a position to tell
14 you the likelihood of whether you would get relief and what
15 that relief would be.

16 But the one thing I can tell you is that you waive
17 your right to appeal, if you waive the proceedings in this
18 case, it will stop. And so, what I want to encourage you to
19 think about is that you can simply let things go, take their
20 natural course and there's nothing in that that is failing
21 to accept responsibility. Okay.

22 So I want you to -- because it seems to me from
23 what you're saying that the only way you can really accept
24 responsibility is to ask that the process be stopped. And I
25 don't think that's the case and I want you to reflect on

1 whether or not that's the case or not.

2 MR. TABLER: That's not the case.

3 THE COURT: Okay, but think about that if you
4 will.

5 MR. TABLER: It's just overall.

6 THE COURT: The second thing I want you to think
7 about is I don't want you to have boxed yourself in by
8 saying that there's one person who can change your mind on
9 this, and that if she doesn't do that, which she seems to
10 be, as you say, respecting your position on this. But this
11 is not on her, and this is your decision and I would suspect
12 that she is probably keying off of what she thinks you want.

13 And there will be no shame in you changing your
14 mind about this and I don't want you to have set this up to
15 require her to give you the cue to do something. I want you
16 to exercise your own judgment in this.

17 MR. TABLER: I understand.

18 THE COURT: Whether or not, whatever she wants,
19 this is about your decision. Okay?

20 MR. TABLER: Right.

21 THE COURT: So whatever she does, if you have a
22 second thought about this, that's what I want to hear about,
23 okay? It doesn't matter whether she or anyone else changes
24 your mind, I'm interested in what you want and what you see
25 going forward.

1 I can tell you that if you do abandon this
2 process; in other words, if you change your mind and you say
3 I want to go forward with this appeal, that you will get the
4 full protection of the law that will go through this process
5 and it will have an end some day one way or the other,
6 right?

7 And if what you're thinking is -- if what's
8 motivating this is to just have this end as soon as
9 possible, I understand why you may be doing that, but that
10 in itself is probably not a reason to do it, right? Because
11 as long as there's life there's hope.

12 And I'm not the one to make that decision. I'm
13 not in your shoes. And when you say, you know, put the shoe
14 on the other foot, I fully agree and at the end of the day
15 that's what I'm struggling with is trying to understand what
16 you're going through, through your lens. And I promise you
17 I'm struggling with that with everything in me. I'm taking
18 that seriously and I'm going to do the best job I can do.

19 I'm not Solomon but I try and I'll do the best
20 with all the information that you have given me and what
21 everybody else has given me.

22 MR. TABLER: If you would like some help I'm sure
23 that the Attorney General can retrieve the video footage of
24 me in my cell, what it's like, a birdseye view, see what I
25 do every day, seven days a week.

1 THE COURT: I take your word for it. I think it's
2 been adequately described to me.

3 But, anyway, those are the observations I wanted
4 to make. And so as we go from here today, you have the
5 right to change your mind at any time, there's no shame in
6 that, it does not -- there's nothing about changing your
7 mind that is failing to accept responsibility. You can
8 expect -- you can accept responsibility and have this
9 process play out. Okay?

10 And whatever anybody else tells you or whatever
11 cue they give you about what they want to do shouldn't
12 matter. I want it to be what you want and what you think is
13 right for you and nobody will second guess that. Okay?

14 MR. TABLER: I know.

15 THE COURT: Great.

16 Anything from the State?

17 MS. PATTON: No, Your Honor.

18 THE COURT: Anything else?

19 MR. NOLAN: No, Your Honor. Thank you very much.

20 THE COURT: So, I'm respectfully directing the
21 transport officers to find accommodation that the marshals
22 are preparing to give Mr. Tabler a ten-minute, noncontact
23 visit with his mother, and I would appreciate your
24 compliance with that order.

25 OFFICER: Yes, sir.

THE COURT: Thank you very much.

All right, thank you all very much.

(Whereupon, the hearing then adjourned

at 5:05 p.m.)

* * * * *

C E R T I F I C A T E

I, Pamela J. Andasola, Certified Shorthand Reporter, Registered Merit Reporter, Federal Certified Realtime Reporter, in my capacity as Official Reporter do hereby certify that I was present and recorded the above proceedings in stenotype and reduced the same to typewritten form, that the foregoing 222 pages constitute a true and complete record of the proceedings, to the best of my ability, had and done on July 9, 2018, before the Honorable ROBERT PITMAN, Courtroom 4 of the United States District Court, Western District of Texas, Austin Division.

Dated this 28th day of August, 2018.

s/Pamela J. Andasola
PAMELA J. ANDASOLA, CSR/RMR/FCRR

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